Feb 1 1872

Submitted —

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 394.

F. BARTEMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Ex 187 Assignments of Error

FILED NOVEMBER 22, 1871.

Ord to submit

Feb 17 1872

SUPREME COURT OF THE UNITED STATES.

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1 STATE OF IOWA
vs.
F. BARTEMEYER, SR.

Be it remembered that, on the 7th day of April, A. D. 1871, there was filed in the office of the clerk of the supreme court of Iowa, a transcript in words and figures following, to wit:

2 STATE OF IOWA, *County of Scott, ss:*

Pleas before the circuit court of Iowa, at a term begun and holden in the county of Scott, on the 12th day of December, 1870, before the Hon. H. H. Benson, judge of the first circuit, seventh judicial district of State of Iowa.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR.

On information for selling liquor.

Be it remembered that, heretofore, to wit, on the 21st day of March, 1870, there was filed in the office of the clerk of the circuit court in and for the county of Scott, information, demurrer, motion to dismiss and quash, and transcript in words and figures following, to wit:

STATE *State* OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Information before T. B. Dowd, justice of the peace in and for Scott County, Iowa.

The defendants are accused of the crime of selling intoxicating liquors.

For that in Davenport township, Scott County, Iowa, on the
3 7th 8th days of March, 1870, they, the defendants, did sell intoxicating liquors to one Timothy Hickey, and received pay of the said Hickey therefor, and that the said defendants are in the practice of selling liquors daily to parties otherwise than the above-named Hickey, contrary to law and against the peace and dignity of the people of the State of Iowa.

JOHN MURRY.

STATE OF IOWA, *Scott County, ss:*

I, John Murry, being duly sworn, do depose and say that I know the contents of the foregoing information, and know the statements therein contained to be true, as I verily believe. So help me God.

JOHN MURRY.

Subscribed and sworn to by John Murry in my presence this 8th day of March, 1870.

T. B. DOWD, *J. P.*

STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

J. H. Herron for State.

4 CHARGE: Selling intoxicating liquors.
Information filed by John Murry, M'ch 8, '70. Warrant

issued M'ch 8, '70, to police John Murry, who served the same by arresting defendants and bringing them into court. Defendants not being ready for trial, continued to M'ch 11, '70, at 2 o'clock p. m.

March 11, '70. Adjourned to M'ch 15, '70, at one o'clock p. m. Defendant filed his affidavit for change of same, and paid 50 c'ts for transcript; change granted Bl. Peters, J. P.

T. B. DOWD, *J. P.*

I hereby certify that the foregoing is a true and correct transcript of all my docket entries in this cause.

Davenport, M'ch 14, '70.

T. B. DOWD, *J. P.*

Demurrer.

STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Before Bl. Peters, a justice of the peace in and for Scott Co., Iowa.

And now comes the defendant, by their attorney, W. T. Dittoe,
5 and demur to the information, and for cause, say:

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendment thereto is opposed to the common weal of the State of Iowa, and the United States.

2nd. The act of the legislature of the State of Iowa, entitled an "Act for the suppression or intemperance," and the amendment thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3d. The information contains matter which constitutes a bar to this prosecution.

W. T. DITTOE,
Plaintiff's Att'y.

Motion to dismiss and quash.

STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Before Bl. Peters, justice of the peace.

And now come the defendants, by their attorney, W. T. Dittoe,
6 and move the court to dismiss this cause of action, and that the proceedings be quashed for the following reasons, viz:

Because—

1. The act of the legislature of the State of Iowa, entitled an "Act for the suppression of intemperance," and the amendment thereto, is opposed to the common weal of the State of Iowa, and the United States.

2. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance, and the amendment thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

W. T. DITTOE,
Plaintiff's Att'y.

THE STATE OF IOWA
v.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Information & papers filed M'ch 15, '70.

In consequence of a change of venue from Justice Dowd's office—
7 Jos. Herron, att'y for the State, and W. T. Dittoe for the defendant—the defendant files a demurrer and motion to dismiss, on account of the unconstitutionality of the law whereon the information is based, and, after hearing the argument of counsel, adjourned till one o'clock p. m., on the 18th of March, 1870. Now, to wit, this 18th of March, 1870, at one o'clock p. m., the defendants appear with attorney and the prosecuting witness, and it is by me ruled that the demurrer is well taken, for the reason given by the defense, and for the additional reason the prohibition liquor law is contrary to 26, art. 1 of the constitution of the State of Iowa, and grant the motion to dismiss. Excepted to by the counsel for the State. Suit dismissed. Plaintiff gives notice of an appeal, Mar., 1870.

BL. PETERS, *J. P.*

THE STATE OF IOWA, *Scott County, ss:*

The foregoing is a true, complete, and perfect transcript of all proceedings in the above-entitled cause, as the same remain entered
8 into my docket at Davenport, in said county, this 18th March, 1870.

BL. PETERS, J. P.

And afterwards, on the 21st day of December, 1870, there wa[s] the office of the said clerk a bill of exceptions, in words an[d] following, to wit:

BILL OF EXCEPTIONS.

In the circuit court of the State of Iowa, in and for Scott County. Dec. term, 1870.

STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Be it remembered that, at the December term, 1870, of said court, and on the 16th day of December, 1870, this cause coming on to be heard on a demurrer to the information herein by defendant, which demurrer is in words and figures following, to wit:

Demurrer.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTMEYER, JR.

Before Bl. Peters, justice of the peace, in and for Scott Co., Iowa.

9 And now come the defendants, by their attorney, W. F. Dittoe, and demur to the information, and for cause say—

1st. The act of the legislature of the State of Iowa, entitled an "An

act for the supression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3rd. The information contains matter which constitutes a bar to this prosecution.

W. F. DITTOE,
Plaintiff's Att'y.

Whereupon the court overruled said demurrer; to which ruling the defendants at the time excepted.

10 And be it further remembered that afterwards, on the same day, this cause coming on to be heard on the motion of defendant to dismiss and quash the action, which said motion is in words and figures following, to wit:

Motion to dismiss and quash.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

Before B. Peters, justice of the peace.

And now come the defendants, by their attorney, W. F. Dittoe, and move the court to dismiss the cause of action, and that the proceedings be quashed for the following reasons, viz:

Because—

1st. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments thereto, is opposed to the common weal of the State of Iowa and of the United States.

2nd. The act of the legislature of the State of Iowa, entitled "An act for the suppression of intemperance," and the amendments
11 thereto, under which these proceedings are instituted and prosecuted, is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and of the Constitution & laws of the United States.

W. F. DITTOE,
Plaintiff's Att'y.

Whereupon the court overruled said motion, and required the defendants to plead and to go to trial; to which ruling the defendants at the time excepted.

And be it further remembered that afterwards, on the same day, this cause, to wit, the cause of F. Bartemeier, s'r, defendant herein, came on for trial before the court, and the issues joined therein, and the plaintiff, to sustain the charge set out in the information and the issues on his part, offered and read to the court, as evidence, the written plea of said

F. Bartemeyer, s'r, a copy of which is hereinafter set forth and filed in this court; and, on motion of the plaintiff, the said defendant was found guilty by the court on said written plea.

12 And be it further remembered that, at the said December term of said court, on the 17th day of December, A. D. 1870, this cause coming on for hearing, on a motion in arrest of judgment by defendant F. Bartemeier, s'r, which motion is in words and figures following, to wit:

Motion in arrest of judgment.

In circuit court of the State of Iowa, in and for Scott County. Dec. term, 1870.

STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

And now comes the defendant F. Bartemeyer and moves the court in arrest of judgment in this cause, and for grounds says:

1st. The law for the suppression of intemperance is opposed to the common weal of the State of Iowa, and of the United States.

2d. The act of the legislature of the State of Iowa, entitled an "An act for the suppression of intemperance," and the amendments thereto, under which these proceedings are instituted and prosecuted,
13 is null and void, because it is in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States.

3d. There is no crime charged in the information known to the law.

4th. The information charges more than one (1) violation of the law in a single count.

5th. The court erred in finding the defendant F. Bartemeyer, s'r, guilty upon his written plea.

6th. That it does not appear from the whole record in this case that a legal judgment could be pronounced by the court against the defendant.

W. F. DITTOE,
Att'y for Def't.

Whereupon the court overruled said motion; to which ruling of the court the defendant at the time excepted.

And be it further remembered that, afterwards, on the same day, this cause coming on for hearing, on a motion made by defendant for a new trial, which said motion is in words and figures following, to wit:

14 *Motion for new trial.*

In the circuit court of the State of Iowa in and for Scott County. Dec. term, 1870.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR.

And now comes the defendant F. Bartemeier, s'r, and moves the court for a new trial of this cause, and for grounds, says:

1st. The court erred in rendering judgment against the defendant on his written plea.

2nd. The finding of the court is contrary to the evidence in this case.

3d. The court erred in overruling the demurrer to the information and motion to dismiss this cause.

W. F. DITTOE,
Att'y for Def't.

The written plea referred to in said motion in arrest of judgment and for new trial is in words and figures following, to wit:

Plea.

In the circuit court of the State of Iowa in and for Scott County.

15 THE STATE OF IOWA
vs.
F. BARTEMEYER, SR, F. BARTEMEYER, JR. } December term, 1870.

And now comes the defendant F. Bartemeyer, s'r, and for plea to the information in this cause says: "He admits that, at the time and place mentioned in said information, he did sell and deliver to one Timothy Hickey, one (1) glass of intoxicating liquor, called whiskey, and then and there receive pay in lawful money from said Hickey for the same. But defendant alleges that he committed no crime known to the law by the selling of the intoxicating liquor hereinbefore described to said Hickey, for the reason, that he, the defendant, was the lawful owner, holder and possessor, in the State of Iowa, of said property, to wit, said one glass of intoxicating liquor sold as aforesaid to said Hickey, prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, known as the act for the suppression of in-
16 temperance, and being chapter sixty-four (64) of the revision of 1860; and that, prior to the passage of said act for the suppression of intemperance, he was a citizen of the United States, and of the State of Iowa.

F. BARTEMEYER, S'R.
P'r W. F. DITTOE,
His Att'y.

Whereupon the court overruled said motion for new trial, and proceeded to pass judgment against said defendant F. Bartemeyer, s'r, in words following, to wit: "On this 16th day of December, 1870, this cause coming on to be heard, on defendant's demurrer to the information and motion to dismiss—W. F. Dittoe appears for the defendants and J. Herron, esq., for the State of Iowa. After argument of counsel, the court overruled the demurrer and motion to dismiss; to which defendant excepts. And, on motion of plaintiff, the defendant F. Bartemeyer, j'r, was discharged. Trial was then had before the court, the defend-
17 ant F. Bartemeyer, s'r, waiving a trial by jury. On his written plea, the court finds him guilty as charged. Defendant then moves in arrest of judgment and for new trial, which is overruled by the court; to all of which defendant excepts.

"It is therefore ordered and adjudged that defendant F. Bartemeyer, s'r, pay a fine of twenty dollars and costs of this prosecution, taxed at nineteen $\frac{5}{100}$ dollars; and that execution issue therefor."

To which ruling of the court defendant at the time excepted. And this

being all the evidence given and received on the trial of the said cause and the rulings of said court in said cause, the defendant F. Bartemeyer, s'r, asks the court to sign this his bill of exceptions and make the same part of the record in said cause, which is done accordingly.

H. L. BENSON, *Judge.*

And afterwards, on the 27th day of January, 1871, there was filed in the office of the said clerk, an "appeal bond," in words and figures following, to wit:

18 STATE OF IOWA, *County of Scott*:

Know all men by these presents that we, F. Bartemeyer, s'r. as principal, and

as sureties are held and firmly bound unto the State of Iowa in the sum of one hundred ($100) dollars, well andt rulyto be paid to the State of Iowa. The condition of this bond is such that whereas the said F. Bartemeyer s'r., has appealed from the judgment of the circuit court of the State of Iowa, in and for Scott County, rendered on the 16 day of December, A. D. 1870, in an action then pending, wherein the said State of Iowa was plaintiff, and the said F. Bartemeyer s'r, and F. Bartemeyer j'r, were defendants, and wherein said F. Bartemeyer was fined by said court the sum of twenty dollars and costs: Now, if the said appellant shall pay to the said appellee, the said fine of twenty dollars, or such part of said fine and all costs as the Supreme Court may direct, and in all respects abide the orders and
19 judgments of said supreme court on said appeal, then this obligation to be void; otherwise to remain in full force and virtue. Dated this 27th day of January, A. D. 1871.

F. BARTEMEYER, *Principal.*
M. FRAHM, *Surety.*
LOUIS MARTEN, "
A. HUNJE, "
F. WULF, "
H. O. SEIFFERT. "

And afterwards, on the same day, there was filed in the office of the said clerk a notice of appeal, in words and figures following to wit:

Notice of appeal.

In the circuit court of the State of Iowa in and for Scott County.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR., F. BARTEMEYER, JR.

To the above-named plaintiff, or to J. Herron, esq., att'y for plaintiff, and to M. D. Snyder, clerk of the circuit court of the State of Iowa in and for Scott County:

20 You are hereby notified that defendant F. Bartemeyer, s'r, has appealed from the judgment of said circuit court, rendered in the above-entitled action on the 16th day of December, A. D. 1870, to the supreme court of Iowa, and that said appeal will come on for hearing and trial at the argument term of said court, to be held at Davenport, commencing on the first Monday in April, A. D. 1871.

W. T. DITTOE,
Att'y for Def't.

I hereby admit due service upon me of the *written* notice of appeal, this 23d day of January, A. D. 1871.

J. HERRON,
Att'y for Plaintiff.
M. D. SNYDER, *C'k.*

STATE OF IOWA, *Scott County, ss:*

I, M. D. Snyder, clerk of the circuit court of Iowa, in and for Scott County, do hereby certify that the foregoing is a true and correct
21 transcript of all the pleading and record entry in the above-entitled cause, as they appear of record in my office, in the city of Davenport, Scott County, Iowa.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed, at my office, in the city of Davenport, Scott County, Iowa, this 31st day of January, A. D. 1870.

[SEAL.] (Signed) M. D. SNYDER,
C'k of Circuit Court.

Bill of costs: Fine, $20 00; costs, 24 05; transcript, 6 00—$50 05.

22 *Journal entries.*

At an argument term of the supreme court of the State of Iowa, begun and held at the city of Dubuque, on Tuesday, the 18th day of April. A. D. 1871—

Present, the Hon. James G. Day, C. J; Hon. Joseph M. Beck, Hon. William E. Miller, Hon. Chester C. Cole, judges—

When the following, among other proceedings, were had and done, to wit:

FRIDAY, *April 21st*, 1871.

THE STATE OF IOWA
vs.
F. BARTEMEYER, SR. APP'L'T.

Appeal from Scott circuit court.

On this day this cause, coming up for hearing, is submitted to the consideration of the court on printed argument of counsel.

23 And at the regular term of said court held at Des Moines on the 17th day of June, A. D. 1871, the same officers being present, the following entry was made in said cause:

THE STATE OF IOWA
vs.
F. BARTMEYER, SN., APP'L'T. } Appeal from Scott circuit court.

This cause having been heretofore submitted to the consideration of the court, and the court being now fully advised in the premises, find there is no error in the judgment and proceedings of the court below, and file their written opinion; it is, therefore, considered by the court that the judgment of the circuit court be, and it hereby is, affirmed, and that a writ of procedendo issue accordingly. It is further considered by the court that the appellee have and recover of and from the appellant the costs herein expended at this court, taxed at $, and that execution issue therefor.

24 *Opinion.*

Supreme court, Iowa. June term, 1871.

THE STATE OF IOWA
vs.
F. BARTMEYER, SR, APP'L'T. } Appeal from Scott circuit court.

An information was filed before a justice of the peace of Scott County, in March, 1870, accusing the defendant of the crime of selling intoxicating liquors contrary to statute, &c., specifying the facts. On a trial had the defendant was found guilty, and adjudged to pay a fine of twenty dollars. He appealed to the circuit court, where another trial was had, with a like result. He now appeals to this court.

W'm T. Dittoe, for appellant.

H. O'Connor, att'y gen'l, for the State.

25 COLE, J.

The counsel for appellant has favored us with an elaborate printed argument, in which he assails the "Act for the suppression of intemperance," as "opposed to the common weal of the State of Iowa & the United States," and as "in conflict with, and in violation of, the constitution of the State of Iowa and the Constitution and laws of the United States."

We regard these questions as settled by the former decisions of this court, and, in view of the large amount of business before us, must content ourselves with simply refer'ing to and following them. (Our House No. 2 vs. The State, 4 G. Greene, 171; Zurnhoff vs. The State, ibid., 526; Santo vs. The State, 2 Iowa, 165.) It is, however, also urged that the plea of defendant admitting the sale, and which was read in evidence on the trial, avers that the defendant was the owner, holder, and possessor, in the State, of said intoxicating liquor at and prior to the passage of the law under which the prosecution was had. Even if this latter fact would constitute a defense, which we do not determine, yet it would not help the defendant's case, because the transcript fails to show that the admissions and averments of the plea was all the evidence, and other testimony may have shown that he did not so own and possess them.

Affirmed.

26 STATE OF IOWA, *Supreme Court:*

I, C. Linderman, clerk of the supreme court of Iowa, do hereby certify that the foregoing pages contain a full, true, and complete copy of the transcript filed in my office in the cause of The State of Iowa vs. F. Bartmeyer, s'r; also, a full, true, and complete copy of the record, entries, and opinion of said court in said cause—as full, true, and complete as the same remain of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 29th day of September, A. D. 1871.

[SEAL.] C. LINDERMAN, *Clerk.*

Costs of supreme court, $14 25; transcript, $8 00—$22 25.

27 STATE OF IOWA, *ss:*

Supreme court of said State. June term, 1871.

THE STATE OF IOWA
v.
F. BARTEMEYER, SR.

It is hereby certified that, at a term of the supreme court of the State of Iowa, held at capitol of said State, at Des Moines, commencing on the first Monday of June, A. D. 1871, the above cause upon final hearing was affirmed, and that in said cause the validity of a statute of the State of Iowa, on the ground that such statute was repugnant to the Constitution, treaties, and laws of the United States, was drawn in question, and that the decision of this court was in favor of the validity of the statute of said State of Iowa.

As witness my hand as associate justice of the supreme court of the State of Iowa this 24th day of August, A. D. 1871.

W. E. MILLER,
Ass't Justice S. C.

27½ (Indorsed:) The State of Iowa v. F. Bartemeyer, s'r. Certificate of W'm E. Miller, associate justice of the supreme court of Iowa. Filed Aug. 24, '71. C. Linderman, cl'k.

28 *Bond.*

Supreme Court of the United States.

F. BARTEMEYER, SR, PLAINTIFF IN ERROR,
v.
STATE OF IOWA, DEFENDANT IN ERROR.

Know all men by these presents that we, F. Bartemeyer, s'r, principal, and M. Frahm, Ferd. Roddewig, H. O. Seiffert, & P. N. Jacobinsen, residents of the city of Davenport, in the county of Scott, & State of Iowa, sureties, are held & firmly bound unto the State of Iowa, in the sum of two hundred ($200) dollars, to be paid to the State of Iowa; to which payment, well & truly to be made, we bind ourselves, and each of us, jointly & severally, and our and each of our heirs, executors, & administrators, firmly by these presents, sealed with our seals, dated this 22d day of August, A. D. 1871.

28½ Whereas the above-named F. Bartemeyer, s'r, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Iowa:

Now, therefore, the condition of this obligation is such, that if the above-named F. Bartemeyer, s'r, shall prosecute his said writ of error to effect, and answer all costs & damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. BARTEMEYER. [SEAL.]
M. FRAHM. [SEAL.]
FERD. RODDEWIG. [SEAL.]
H. O. SEIFFERT. [SEAL.]
P. N. JACOB'SEN. [SEAL.]

Sealed & delivered in the presence of—
Sealed & delivered in the presence of—
W. T. DITTOE.

The sureties on and to the foregoing bond are hereby approved. August 24, 1871.

W. E. MILLER,
Associate Justice Supreme Court of Iowa.

29

29½ (Indorsed:) F. Bartmeyer, s'r, v. State of Iowa. Bond. Filed Aug. 24, '71. C. Linderman, cl'k. Approval within.

30 The United States of America to the State of Iowa greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein F. Bartemeyer, s'r, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Miller, associate justice of the supreme court of the State of Iowa, this 24th day of August, in the year of our Lord one thousand eight hundred and seventy-one.

W. E. MILLER,
Associate Justice Supreme Court of Iowa.

30½ Due and legal service of this citation is hereby acknowledged and accepted for the defendant in error. September 1st, 1871.

HENRY O'CONNOR,
Att'y Gen'l of Iowa.

(Indorsed:) F. Bartemeyer, s'r, plaintiff in error, v. State of Iowa, defendant in error. Citation to defendant. Filed Aug. 24, '71. C. Linderman, cl'k.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Iowa, greetting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Iowa, before you or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between the State of Iowa, defendant in error, and F. Bartemeyer, s'r, plaintiff in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein a title, right, privilege, or immunity was claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the United States, and the decision was against

31½ the title, right, privilege, or immunity specially set up or claimed by the said F. Bartemeyer, s'r, plaintiff in error, under such Constitution, treaty, statute, commission, or authority, a manifest error hath happened, to the great damage of the said F. Bertemeyer, s'r, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
32 said Supreme Court, the 22nd day of August, in the year of our Lord one thousand eight hundred and seventy one.

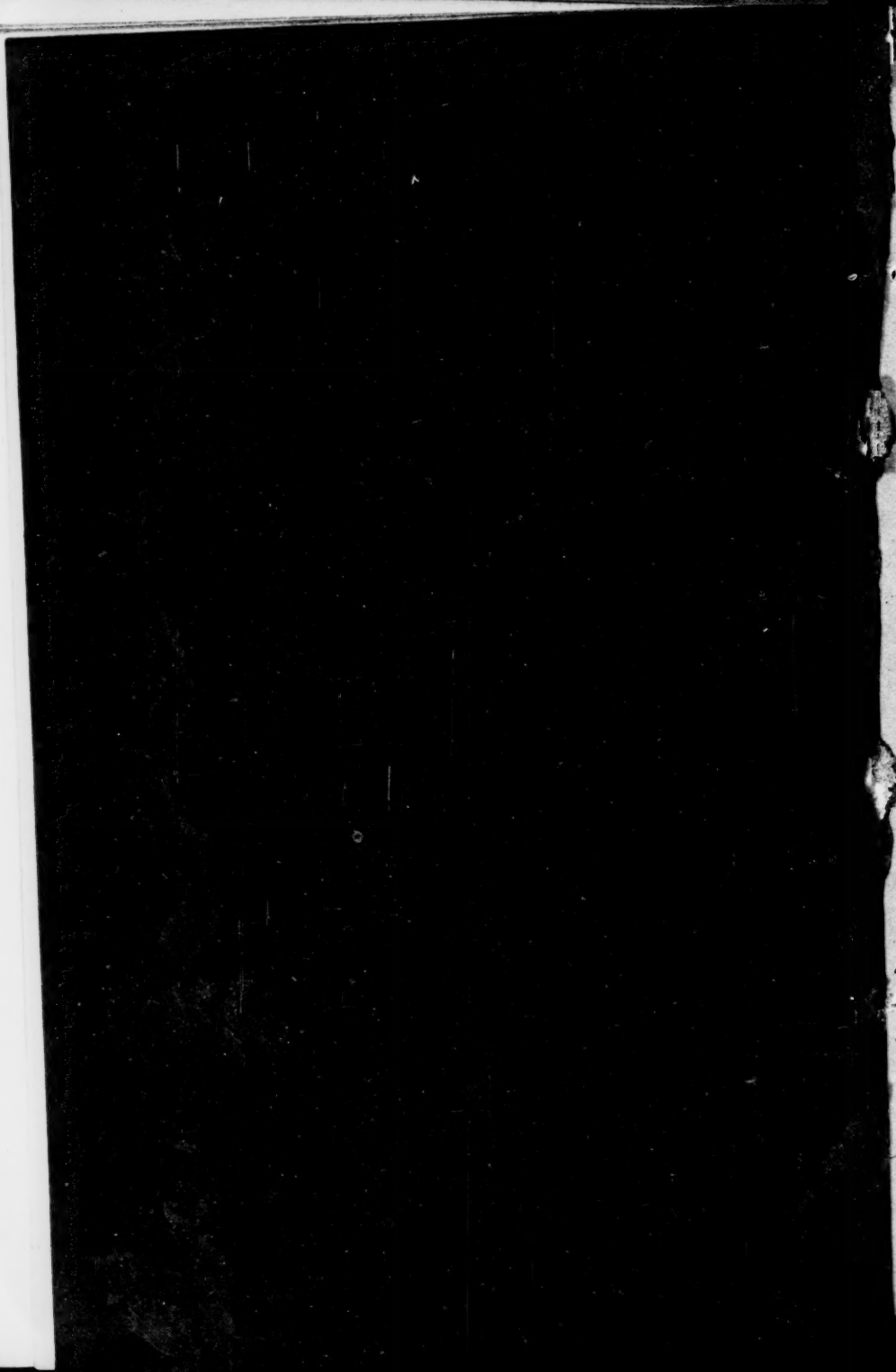
[SEAL.] GEORGE B. CORKHILL,
Clerk Circuit Court U. S., Dist. of Iowa.

33 (Indorsed:) F. Bartemeyer, s'r, plaintiff in error, vs. The State of Iowa, defendant in error. Writ of error to the supreme court of the State of Iowa. Filed Aug. 24, '71. C. Linderman, cl'k.

Ordered, that the within writ of error be, and is allowed, this 24th day of August, 1871.

W. E. MILLER,
Ass't Justice Supreme Court of Iowa.

(Indorsement on cover:) No. 394. F. Bartemeyer, s'r, plaintiff in error, vs. The State of Iowa. Iowa sup. court. Filed 22d November, 1871.



Supreme Court of United States.

*No.*_____

F. BARTEMEYER, Sr., Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF OF APPELLANT:

WM. T DITTOE, for Appellant.

Davenport Democrat Print.

Supreme Court of United States.

F. BARTEMEYER, Sr., Plaintiff in Error,
vs.
THE STATE OF IOWA, Defendant in Error.

In Error to the Supreme Court of the State of Iowa.

BRIEF OF APPELLANT:

WM. T. DITTOE, for Appellant.

APPELLANT'S STATEMENT AND ABSTRACT OF RECORD.

On the 8th day of March, 1870, an information was filed before a justice of the peace in Scott County, Iowa, accusing the defendant, Bartemeyer, with the crime of selling intoxicating liquors, in violation of the statute of Iowa. And on the 15th day of March, 1870, defendant filed a demurrer to the information, and motion to dismiss and quash The demurrer and motion were sustained by the justice, who held the law unconstitutional, and the defendant was discharged, and the State appealed —(Transcript 6.) And on the 21st day of March, 1870, the plaintiff filed in the Scott Circuit Court the information, stating as a cause of action as follows :

The defendants are accused of the crime of selling intoxicating liquors ;—for that in Davenport Township, Scott County, Iowa, on the 7th and 8th day of March, 1870, they, the defendants, did sell intoxicating liquors to one Timothy Hickey and received pay of the said Hickey therefor, and that the said defendants are in the practice of selling liquors daily to parties otherwise than the above named Hickey. (Transcript 2.)

On the 21st day of March, 1870, the defendant filed a demurrer to said information setting up the following grounds :

1st. The act of the legislature of the State of Iowa, entitle "An act for the suppression of intemperance" and the amend ments thereto, are opposed to the common weal of the State Iowa and the United States.

2d. The act of the legislature of the State of Iowa, entitle "An Act for the suppression of intemperance" and the amend ments thereto, under which these proceedings are instituted an pros cuted, are null and void, because they are in conflict wit and in violation of the Constitution of the State of Iowa, and th Constitution and laws of the United States.

3d. The information contains matter, which constitutes a ba to this prosecution. (Transcript, 8.)

And on the said 21st day of March, 1870, the defendant file a motion to dismiss this cause of action and quash the proceed ings, setting up the same grounds as number one and two of th above demurrer. (Transcript, 10.) And on the 16th day c December, 1870, the above demurrer and motion was submitte to the Court, and the Court made the following rulings:

The demurrer and motion were overruled by the Court. (Tran script, 9 and 11.)

And on the 16th day of December, 1870, the defendand, F Bartmeyer, Sr., filed the following pleading, setting up the fact hereinafter stated, viz: "For plea to the information in thi cause, says he admits that at the time and place mentioned i said information, he did sell and deliver to one Timothy Hickey one glass of whisky, and did then and there receive pay in law ful money from said Hickey for the same. But the defendan alleges that he committed no crime known to the law by the sell ing of the intoxicating liquor hereinbefore described, to said Hick ey, for the reason that he, the said defendant, was the lawfu owner, holder and possessor, in the State of Iowa, of said proper ty, to-wit: said one glass of intoxicating liquor sold as aforesaid to said Hickey, prior to the day on which the law was passed, under which these proceedings are instituted and prosecuted, known as the act for the suppression of intemperance and being chapter sixty-four of the Revision of 1860, and that prior to the passage of said act he was a citizen of the United States and of the State of Iowa. (Transcript, 15.)

On the 16th day of December, 1870, said cause was tried by

the court and the plaintiff, to sustain the charge set out in the information, offered and read to the court the written plea of the defendant herein before set out, and on motion of the plaintiff the defendant was adjudged guilty of the crime charged. [Transcript 11.]

On the 17th day of December, 1870, the defendant filed a motion in arrest of judgment upon the following grounds :

The 1st and 2d grounds are the same as Nos. 1 and 2, set out in the demurrer, herein before set forth. [Transcript 8.]

3d. There is no crime charged in the information known to the law.

4th. The information charges more than one violation of the law in a single Court.

5th. The Court erred in finding the defendant, F. Bartemeyer, Sr., guilty upon his written plea.

6th. That it does not appear from the whole record in this case that a legal judgment could be pronounced by the Court against the defendant. [Transcript 12.]

On the 17th day of December, 1870, the Court overruled said motion in arrest of judgment. [Transcript 12.]

And on the 17th day of December, 1870, the defendant filed a motion for a new trial, upon the following grounds :

1st. The Court erred in rendering judgment against the defendant on his written plea.

2d. The finding of the Court is contrary to the evidence in this case.

3d. The Court erred in overruling the demurrer to the information and motion to dismiss this cause. [Transcript 14.]

And on the same day the Court overruled said motion for new trial. [Transcript 14.]

On the 17th day of December, 1870, the following judgment was entered :

It is therefore ordered and adjudged that defendant, F. Bartemeyer, Sr., pay a fine of twenty dollars and costs of this prosecution, taxed at nineteen 65-100 dollars, and that execution issue therefor. [Transcript 17.]

To all the rulings made by the Court, set out above, the defendant at the time excepted.

On the 27th day of January, 1871, the defendant perfected an

appeal to the Supreme Court of the State of Iowa, by serving upon the plaintiff and Clerk of the Circuit Court of Scott county a notice of appeal.

I.

ARGUMENT.

The act of the Legislature of the State of Iowa, entitled an "Act for the Suppression of Intemperance," is in conflict with Art. 14, Sec. 1, of the Constitution of the United States, which declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and also with the "Civil Rights Bill," Sec. 1, 14 Stat. 27, and the act to enforce the rights of citizens, Sec. 16, Chap. 114, U. S. Stat. 41st Congress, 2d session, 1870, 144. The first point to be determined is, what are the privileges and immunities of a citizen of the United States, the States are forbidden to abridge, by the second clause of the section above cited? It is difficult to define them all. But one may safely assume, that among the fundamental privileges protected by the fourteenth amendment, is the right to acquire, possess and dispose of real and personal property, and to follow any useful and lawful occupation—any occupation recognized directly or indirectly as lawful by the Federal laws—subject only to such regulations as the State may impose, but which regulations must be reasonable and not inconsistent with constitutional restrictions, and such as are absolutely necessary for the safety and support of the State Government. Under this clause a citizen of the United States has the undoubted right to go into any State in the Union, take such property with him, as is recognized as property by the laws of the United States, and sell the same, subject only to such taxation as is necessary for the support of the Government, and no more. All trades and professions, recogniz-

ed as lawful by the United States, are placed within the reach of every citizen by this amendment. Qualification, not caste, is now the rule. That, the great right of liberty of pursuit, is one of the fundamental privileges of a citizen of our republic, and is one of the privileges protected by this amendment, no one will be so bold as to question. In order to get a clear idea, as to what are some of the privileges and immunities of a citizen of the United States, which cannot be abridged by the States, let us for a moment blot out of existence the several State Governments, and then inquire, what, in such event, would be the rights of such citizens under the fourteenth amendment? Certainly all privileges and immunities, recognized as lawful by the common law and the laws of the United States, could be freely exercised, and unquestionably the absolute rights of individuals would in such case receive ample protection. Now, if these sacred rights are thus protected, and can be enjoyed, then all State laws that abridge, or in any manner curtail or interfere with their full and complete enjoyment, are null and void. On this question, Justice Bradly, of the Supreme Court of the United States, in The Live Stock Dealers' and Butchers' Association, of New Orleans, *et al.*, *vs.* The Crescent City Live Stock Landing and Slaughter House Company, *et al.*, No. 3, Chicago Legal News, Vol. 3, 17, says:—"The 'privileges and immunities' secured by the original Constitution, were only such as each State gave to its own citizens, each was prohibited from discriminating in favor of its own citizens, and against the citizens of other States. But the fourteenth amendment prohibits any State from abridging the privileges and immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges, *but it demands that the privileges and immunities of all citizens shall be absolutely unabridged and unimpaired.*

If the above construction be true, and there is no reason why it is not, can we imagine a more flagrant violation of the fundamental privileges and immunities of an American citizen, than is perpetrated by the act in question. It says, in substance, that no person shall manufacture, sell, or keep, with intent to sell, intoxicating liquors within the State of Iowa, except for

mechanical, medicinal, culinary or sacramental purposes only, and if such liquors are manufactured, sold, or kept with intent to sell, contrary to this act, or kept in any place except a dwelling house, they are declared a nuisance and forfeited ; it prevents a citizen of the United States, whose business it is in a sister State to manufacture or sell liquors, from coming to Iowa to follow either of such occupations ; Sec. 1, Art. 3, forbids the manufacture and sale of wine, in the State of Iowa, from grapes or currants grown in another State ; and Sec. 2, Art. 2, excludes "hotel keepers, keepers of saloons, eating houses, grocery keepers and confectioners," from the privilege of receiving a permit to buy and sell intoxicating liquors for "mechanical, medicinal, culinary and sacrament purposes only." Not satisfied with the stringent prohibitory measures of the first section of the statute, Sec. 2, Art. 2, brands a very large and respectable number of our citizens, as unworthy the confidence and trust of the State, not on account of any incompetency or bad character, but because of the occupations they have chosen to follow. Why proscribe persons who are engaged in a business now and always considered useful and honorable ? Is the vending of liquors for the above named mechanical and other purposes of such a high character that an honest dealer in tea, sugar, coffee and spices, or sweetmeats, can never hope to reach it ? Can or will a law contemplating such depredations upon the privileges and the immunities of citizens of the United States, be sustained by the supreme judicial tribunal of the country ? In other words, is it possible for that high tribunal of justice, to construe the above constitutional clause to mean that a citizen of the United States has the right in the State of Illinois to manufacture, sell, and keep with intent to sell, intoxicating liquors, and to institute and maintain an action for the recovery or possession of intoxicating liquors, or the value thereof, and then step over into the State of Iowa and hold a contrary doctrine, because the latter State prohibits the exercise of those fundamental rights ?

It may be claimed that the fourteenth amendment only appplies to the negro and others born in this country, who were, under the original constitution, deprived of political privileges. Judge Bradley, in the case above cited, on this point, says : "It is possible that those who framed the

the article (14th amendment) were not themselves aware of the far-reaching character of its terms. They may have had in mind but one particular phase of social and political wrong, which they desired to redress. Yet, if the amendment, as framed and expressed, does, in fact, bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach such social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their imprematur, understood what they were doing, and meant to decree what has, in fact, been done."

The Court is referred to the slaughter house case above cited.

U. S. ex. John Hall et al, Chicago Legal News Vol. 3. 261; II I. H. Wash. C. C. R. 380.

It is repugnant to the Constitution and laws of the United States, and the Constitution of the State of Iowa, because it deprives a person of his liberty and property, without due process of law.

Article II of the, Ordinance of 1787 provides, "that no man shall be deprived of his liberty or property, but by the judgment of his peers or the laws of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property—full compensation shall be made for the same." This provision of the Ordinance of 1787 was incorporated in the organic laws of Michigan, Sec. 2, of Wisconsin, Sec. 12, and of Iowa, Sec. 12, and the Bill of Rights of the Constitution of the State of Iowa, Art. 1, Sec. 1, provides, "That all men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protectingproperty." Sec. 9 declares: "No person shall be deprived of his life, liberty, or property without due process of law." Sec. 18 declares, "Private property shall not be taken for public use without just compensation first being made or secured, to be made to the owner thereof," and Sec. 25 declares, "The enumeration of rights shall not be construed to impair or deny others, retained by the people." And notwithstanding all these safeguards thrown around the absolute rights of individuals, the people were yet fearful the legislative

power of the States might yet deprive them of some or all of those sacred rights, and ever jealous of their rights, they, in the majesty of their power, declared by the fourteenth amendment to the Constitution of the United States, that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law." Section 1, Article 1, of the act under consideration declares, in substance, "that no person shall manufacture, sell, or keep with intent to sell, any intoxicating liquors contrary to the provisions of the act, and declares all such liquors a nuisance, and that they shall be forfeited." The sole object of the law is prohibition—the destruction of property in liquors, yet the Constitution says, that all men shall have the right of acquiring, possessing and protecting property, and that they shall not be deprived of it "without due process of law." "Due process of law" may be defined to be, that no person shall be deprived of the rights of person or property without a regular trial, in a court of justice, according to the course and usages of the common law. It follows that the legislative power of a State cannot, in the face of the constitutional clauses above quoted, enact a law depriving a man of his liberty or property, that conflicts with the common law as it existed at the time of the adoption of the Constitution. Were it otherwise—had the people intended to confer this power on the Government, they certainly would not have been so careful in restricting its powers in the Constitution. Certainly no one would be so bold as to claim that the Legislature of Iowa had such power prior to the adoption of the Constitution, or that the common law gives it such immense power. The common law has never been abolished. That part of it relating to the absolute rights of individuals has been ingrafted in the laws and clauses of the Constitutions above quoted, and I am wholly unable to discover the source whence the Government of Iowa got its authority to enact a law, which, in defiance of all rules of common law, as well as the fundamental rules of the Constitutions, and declares a certain class of property a nuisance, and that it shall be forfeited. The Supreme Court in "The State

Ex rel. Pitman, *et. al., vs.* Adams, *et. al.*, 44 Mo. 585, say, "But an act declaring a forfeiture, if outside of legislative authority, cannot be strengthened by reciting facts that might judicially work a forfeiture, unless those facts are judicially passed upon. The question of forfeiture is strictly judicial, and the Legislature cannot constitutionally know either that the facts exist or their legal effect. It would be absurd to hold that we are bound by a recital of facts which the Legislature had no right to find, and by an assumption of their effect, which it had no right to declare." In a limited government like ours the power of forfeiture can only be exercised in the mode proscribed by the Constitution, and when the Constitution fails to furnish a rule, then the common law steps in and furnishes one. *State v. Simmo* 3 R. I. 71.

Section 7, Art. 1, provides, that "proof of finding the liquor named in the indictment, or information in the possession of of the accused in any place except his private dwelling house, or its dependencies (or in such dwelling house or dependencies, if the same be a tavern, public eating house, grocery, or any other place of public resort,) shall be received and acted upon by the Court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of this act." Hence if the accused cannot establish by proof *aliunde*, for he is charged with a a crime, and his mouth is closed, that the liquors if found outside of his dwelling house, were not kept or held for sale contrary to the provisions of the act, he is, although innocent, and by force of this law, must be found guilty and fined accordingly by the Court. This is not all ; the next section follows, by declaring, "In case of a violation of any of the provisions of either of the three preceding sections, the building or erection of whatever kind, or the ground itself in or upon which such unlawfal manufacture or sale, or keeping with intent to sell, of any intoxicating liquor, is carried on or continued, or exists, is hereby declared a nuisance, and may be abated as the law provides." Thus it is seen that if a man be found guilty under sections 5 ,6 or 7, he can make no defense, if any officer of the law wishes to abate the property in which the liquors were found. Is this not depriving a person of his liberty and property

"without due process of law ?" Does not these two sections reverse that ancient and humane rule of common law, by presuming a man guilty, instead of his innocence ? How can the Legislature reverse that wholesome rule, when the Constitution, the source of all its powers, forbids it ? Does not the act destroy absolute rights ? The absolute rights of individuals are higher than the Constitution, and in construing a statute that encroaches upon, or deprives a person of any of those sacred rights, every doubt should be resolved by the Court in favor of the absolute right. The power over these rights has never been surrendered by the people ; on the contrary, they have doubly fortified them by prohibiting the State and the United States from in any manner whatever touching them.

The only evidence, in the case at bar, of the defendant's guilt, is his written plea, which establishes the fact, that the intoxicating liquor, alleged in the information to have been sold by defendant, was owned and possessed by him prior to the passage of this law, and that defendant was at that time and is a citizen of the United States. On this evidence the defendant was found guilty by the Court and fined accordingly. The Court of Appeals of New York, in Wynehamer *vs.* The People, 3 Ker, 486, says, 1st. "That the prohibitory act, in its operation upon property in intoxicating liquors existing in the hands of any person within this State when the act took effect, is a violation of the provision in the Constitution of this State, which declares that no person shall be "deprived of life, liberty or property, without due process of law." 2d. "That inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant a defense based upon the distinction referred to, it cannot be sustained in respect to such liquors, whether existing at the time the act took effect, or acquired subsequently." The above principles of law have never been questioned. The act of New York contained the same provisions the one under consideration does. This act unquestionably deprives a man of his liberty and property "without due process of law." If the Legislature has the power to enact a law declaring a class of property, always recognized by

law as property, a nuisance, and forfeited, and forbid its manufacture and sale, what security have we for our vested rights in property? A vested right in property cannot be taken away or destroyed by a legislative enactment, or by any power, without compensation "first being made or secured to be made to the owner." If it could be, we would hold our property subject alone to the vacillating will of the Legislature. A person might one day be the fortunate possessor of a large amount of valuable property, and the next day the Legislature may step in and declare that his property is injurious to society; that it is a nuisance and must be forfeited for the good of the commonwealth. Thus, if we concede this power, by the simple act of the Legislature, the acquisitions of a life-time are swept out of existence, and the owner is remediless. If the Legislature has this uncontrolled power over the lives, liberty and property of individuals, and surely it has assumed it, by the passage of this act, it possesses despotic authority, and may use it at will. Our rights would no longer be safe. We would not be republicans, but slaves. On this point Justice Story, in Wilkins *vs.* Leland, 2, Peters, 657, says, "That Government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention." If such authority is possessed by the State, what is to prevent an anti-coffee and tea-drinking Legislature from enacting a similar law in relation to those articles of property. If it has the power in relation to liquors, it has it in relation to coffee and tea, which are, by eminent medical authority, deemed very injurious to health—the primary cause of many fatal diseases. The State can know no dis-

tinction between different kinds of personal property. Its characteristics of individuality are alike in all cases. Hence the power of the Legislature to enact a law destroying property must be general and not special. If it has no such general powers, it can have no special power over a particular class of property. And when the Constitution declares "that all men shall have the right of acquiring, possessing and protecting property, and that no person shall be deprived of his property without due process of law," it makes no distinctions as to any particular class of property, for all classes are held sacred in the eyes of the Constitution, and all speculations, as to the scientific and chemical properties of any class of property, can have nothing whatever to do with it. If the Constitution protects property, it protects all kinds alike, and the Legislature cannot take away the right to own, enjoy and protect it.

Liquor held to be property in Iowa, 20 Iowa 308; 25 Iowa 388,

It is plain that by the operation of this law the commercial qualities of intoxicating liquors are totally destroyed. It is unlawful to own, sell or keep it with intent to sell. It is declared a nuisance, and the protection of the law is withdrawn from it. Property is valueless unless it can be owned, sold and enjoyed. It is in fact useless for commercial purposes. It is true, the law permits the sale of liquor for mechanical, medicinal, culinary and sacramental purposes, but these are only incidental uses of the article. Sales cannot under any circumstances be lawfully made in contemplation of any general purposes. It is a wholesale scheme for the destruction of property in liquors in the State of Iowa. It annihilates its value and strips it of all its attributes of property, and evidently conflicts with the provisions of the Constitutions above quoted. The law, so far as it effects property in existence at the time it took effect, is subversive of the first principle of justice. It is more like the edict of a despot than a law enacted by a constitutional Legislature of a free people. It usurps, assumes and exercises powers inconsistent with the fundamental principles which underlie our republic. It changes innocence into guilt. It makes an act criminal which, when done was lawful, by punishing a person for having his liquor remain in his grocery store, where he had placed it before the law took effect. Hence, so far as the act effects property

owned before the law took effect, it does unquestionably "deprive a person of his property without due process of law," for the moment it took effect all vested rights in such property were destroyed and all that was required to be done by the officers of the law, was to carry into effect the decree of forfeiture already pronounced the Legislature.

We have already seen that this law declares all intoxicating liquors manufactured, sold, or kept for sale, in violation of the act, a nuisance, and that they shall be forfeited. This, it is claimed, is done in self defense—by virtue of the police power. If the State has, under the guise of the police power, the authority to declare a certain class of property a nuisance, has it less the authority to withdraw its protection from any other class of property? I have no doubt that a State may, under the authority of the police power, prevent the introduction of anything that has the ingredients within itself that may corrupt the morals or endanger the health or lives of the citizens; but in all cases the thing must of itself work the corruption or endanger the health of the community; that is, the danger must be immediate. Nothing can be anticipated. Justice McLean, in the "License Cases," 5 H. 593, in referring to this question, observes, "But the exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to effect in some degree the public welfare. The import must be of such a character as to produce by its admission or use a great physical or moral evil." Putrid meats, infected goods, or licentious publications come within the perview of this power, and the use of either of those articles is dangerous. The danger does not, as in the case of intoxicating liquors, depend altogether on their abuse. They cannot be used under any circumstances without injurious effects follow, and liquors can and are used beneficially. The act of a Legislature declaring a certain class of property unsound and injurious to the morals and health of the community, does not make it so, and the police power will not shield the act from condemnation by the Court. The State may, under this power, prevent the immigration of paupers, vagabonds and fugitives from justice, but that does justify the exclusion of persons who are not vagabonds, pau-

pors or fugitives from justice. The police power is the right of self-preservation. The State possesses the same rights of self-preservation that are held by an individual, and can do all and no more than an individual can do in self-defense. An individual possesses the same right that the State does, to declare an article a nuisance. But neither can declare an article a nuisance that is not one in itself, and each must assume the responsibility of mistakes. It is true, this class of property is sometimes abused by some of the human family. But are there not many other classes of property that are subjects of abuse by man. There is nothing that we eat or drink but that is more or less perverted to some bad end by many of our race. Wheat, corn, and rye may be and are used in the manufacture of intoxicating liquor. If intoxicating liquors are dangerous to the health and morals of the citizens, are not wheat, corn and rye, which are the original source of a large class of intoxicating liquors, also dangerous? Why not prohibit the importation, production and sale af those articles? The power is as ample in the one case as it is in the other.

Intoxicating liquor is not a nuisance in itself. It does not possess a single element of a nuisance about it. If annalized it will be found to be perfectly free from the least impurity, and the State cannot by enactment make it a nuisance. It is hard to understand how the State can by statute declare an article under certain circumstances divested of all the qualities of property, and under others invest the same property with all the safeguards of the law. The State cannot make that distinction, and a law that does, is not uniform in its operation. It must apply to all liquors alike, unless there is something in the liquor itself that makes the distinction. The change of ownership or location cannot do that. On this point the Court, in Preston *vs.* Drew, 33 Maine 562, says, "It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes."

In Wynehamer vs. The People, 3 Ker., 454. Hubbard, J, says, "It is not pretended, nor can it be, that property which is not

per se a nuisance can be annihilated by force of a statute alone or by proceeding *in rem* for the punishment of a personal offence. Liquor is not a nuisance *per se*, nor can it be made one by a simple legislative declaration. It does not stand in the category of common nuisances which of themselves endanger the welfare and safety of society." A nuisance is anything that works of itself some inconvenience to the public or some private individual, and the declaration that all intoxicating liquors, manufactured, sold or kept with intent to sell contrary to this act, is a nuisance, is an assumption not warranted by the Constitution. It is an absolute destruction of property in liquors, for no man can lawfully sell a nuisance to his neighbor, hence its salable qualities are ruined. No one will deny but that intoxicating liquors, prior to the passage of this law, were invested with all the attributes of property by the common law, and that they are now and always have been recognized as property by the common law, by the laws of the United States and of the commercial world. If this be true, and it certainly is, how can the Legislature, by statute, declare that article of property a nuisance, which does not possess a single ingredient of a nuisance about it, and thus authorize and legalize its destruction. Whether a thing is a nuisance, is a judicial and not a legislative question, and can only be ascertained by the rules of common law. But this law assumes the powers of the judiciary, and decides the question without trial, and leaves to the judicial tribunals the very pleasant task of carrying the judgment already passed by the Legislature into execution. If the right of property consists in its "free use, enjoyment and disposal," there can be no property, in the legal sense of the term, in the thing, unless the owner can use, enjoy and sell the same, for that which cannot be used, enjoyed and sold, is not property, and a statute that takes away any or all of these rights, deprives the owner thereof "without due process of law." The mere intent in a person's mind cannot be deemed the act of his property, and such intent will not work a forfeiture of his property at common law. The Le Tigre 3 Wash. C. C., 567 and 572; Fisher *vs.* McGirr, 1 Gray, 22. In Rex *vs.* Wharton 12 Mod. 510, Holt, C. J., says, "if one see his neighbor erecting a thing which will be-

come a nuisance, he cannot abate it till it becomes an actual nuisance." It is a well established rule of law, that an act justified by a lawful and competent authority cannot be made the foundation of an action, either civil or criminal, and how Sec. 7, Art. 1, which makes it a misdemeanor to have liquors remain in a store-room, where they had been lawfully placed, before the law took effect, can be sustained, is more than I can comprehend.

Opinions of Comstock, J. 382, A. S. Johnson, J. 416 to 425, Selden, J., 428, Hubard, J., 453 to 456, and Denio, C. J., 459, and cases therein cited, in Wynehamer *vs.* The People, 3 Ker. Opinion of Senator Sherman in Russell *vs.* Mayor of New York, 2 Den. 461 ; Taylor *vs.* Porter, 4 Hill, 145-6 ; Sacket *vs.* Andros, 5 Hill, 358–9 ; Hoke *vs.* Henderson, 4 Dev. 1 ; Green *vs.* Biddle, 8, W. 175 ; Green *vs.* Briggs, 1 Curtis, 311 and 325, Ex porte Milligan, 4 Wal. 4. Weatherbee v. Bragg, 12 N.Y. 20; Cummings v. State, 4 Wal. 320, 321, 325 & 326; Ex parte Garland, Ibid. 333; Craig et al v. Kline et al, 65 Penn. III. 412 & 413.

This law is repugnant to Art. I, Sec. 8, of the Constitution of the United States, which declares, "The Congress shall have power to regulate commerce with foreign nations and, among the saveral States, and with the Indian Tribes. Sec. 9, declares, "No preference shall be given to any regulation of commerce or revenue to the ports of one state over those of another ; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another ; and Sec. 10, declare that, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Sec. 8 above quoted, undoubtedly confers upon congress the exclusive control over commerce among the States. If there is any doubt as to the extent of power conferred upon Congress by Sec. 8, certainly Sec's 9 and 10 must remove it. Sec. 9 requires uniformity in the regulations of commerce among the States, which could not prevail if the States possessed concurrent power with Congress over commerce, and it declares the States shall not pass any law requiring vessels to enter, clear or pay duties in another ; and Sec. 10 abso-

lutely forbids the States to lay any imposts or duties on imports or exports without the consent of Congress, except what may be absolutely necessary for executing the inspection laws of the State. Thus it seems clear that a State cannot possess concurrent power with Congress over interstate commerce; if it did, it would not require the consent of Congress before it could make a regulation of commerce. It will not be claimed that the statute under consideration is a law for the inspection of imports or exports. If it is not an inspection law, then, it, having in view the prevention of the importation of liquors, is a regulation of commerce, and to make it a valid law, the consent of Congress was necessary, and it will not be claimed the State has ever obtained such consent. It follows, that if the State does not possess concurrent power over inter-State commerce with Congress, that Congress possesses exclusive control over the same. The Supreme Court of Iowa, in Santo, *et al*, *vs.* The State of Iowa, 2 Iowa, 202, uses this language, "In Gibbons *vs.* Ogden, 9, Wheat, 1, it was held that the power to regulate commerce between the States, given to Congress by the Constitution, was not *exclusive* in Congress until exercised—nor, perhaps, until there was a collision between regulations made by Congress and by a State. And the same view was taken in Wilson *vs.* Blackbird Creek, Marsh Co., 2, Pet, 251." In order to ascertain what was held by the Court in the cases above cited, let us take the cases themselves and then the opinions of the several learned Judges of the Supreme Court of the United States and other Courts. C. J. Marshall, in Gibbons *vs.* Ogden, 9 W. 194, says, "The subject to which the power is next applied, is to commerce 'among the States.' The word 'among' means intermingled with. A thing which is, among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior." Again, 196, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is

vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Again, 227, "The power of a sovereign State over commerce, therefore amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits of its freedom necessarily implies the power to determine what shall remain unrestrained, *it follows that the power must be exclusive ; it can reside but in one potentate ; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.*"

And lastly, 228, the learned Chief Justice remarks, "The power to regulate foreign commerce is given in the same words and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive." And in commenting upon the second clause of Sec. 10, Art. 1, at 236, he observes, "Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States, as to the only two objects which could ever tempt them to assume the exercise of that power, to-wit : the collection of the revenue from imposts and duties on imports and exports ; or from tonnage duty."

In Brown *vs.* The State of Maryland, 12 Wheat, 436, it was decided by the Court that a statute of a State was invalid that imposed a tax on foreign imported goods, and at 449, that eminent jurist, Chief Justice Marshall, who delivered the opinion, remarked, "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." And at 446 the Court says, "It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States."

In the Passenger cases, 7 H. 400, Justice McLean, who delivered the opinion of the Court, says, "Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this Court in the case of Gib-

bons *vs.* Ogden, 9 W. 1, reiterated in Brown *vs.* The State of Maryland, 12 W. 419, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion that the power to regulate commerce with foreign nations and among the several States, by the Constitution, is exclusively vested in Congress."

In the same cases, at 411, Justice Wayne says, "That a majority of us do not think it neaessary in these cases to re-affirm, with our brother McLean, what this Court has long since decided, that the constitutional power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, is exclusively vested in Congress, and no part of it can be exercised by a State. I believe it to be so, just as it is expressed in the preceding sentence."

In commenting upon the case of Wilson *vs.* The Blackbird Creek, Marsh Co., 2 Pet. 250, Justice McLean, in Passenger cases, 7 H. 338, says, "To suppose that he intended to lay down the general proposition that a State might pass any act to obstruct or regulate commerce which did not come in conflict with an act of Congress, would not only be unauthorized by the language used, and the facts of the case before the Court, but it would contradict the language of the Court in Gibbons *vs.* Ogden, Brown *vs.* Maryland, and every case in which the commercial power has been considered."

As to the case of New York *vs.* Miln, 11 Pet. 102, Justice Wayne, who took part in the decision, says, in 7 H. 429 to 433, that case, as reported, is erroneous; that four of the Judge swere of the opinion that the power in Congress to regulate commerce was exclusive, and the remaining three thought otherwise.

Justice Baldwin, in the case of Groves *vs.* Slaughter, 15 Pet. 511, says, "That the power of Congress to regulate commerce among the several States is exclusive of any interference by the States, has been, in my opinion, conclusively settled by the solemn opinions of this Court, in Gibbons *vs.* Ogden, 9 Wheat, 186–222; and in Brown *vs.* Maryland, 12 Wheat, 438–446. If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt, nor can there be any adjudications of this

Court which must be considered as authoritative upon this question, if these are not to be so on this."

In Haldeman *vs.* Beckwith, 4, McLean, C. C. R. 286, the Court says, "A State has no power to regulate commerce which extends beyond its own jurisdiction, and a law of Louisiana regulating the navigation of the Mississippi cannot effect boats engaged in commerce between Louisiana and other States."

In Bark Chuson, 2 Story, C. C. R., 464 and 465, the Court says, "Perhaps it will be suggested that if Congress had passed an act upon this subject it would be paramount authority, and suspend or control State legislation upon the same subject ; but until Congress shall pass such act the States have full authority to act upon it. *This I utterly deny.* If the power to regulate foreign or inter-State commerce be, as I conceive it to be, exclusive in Congress, all State interference therewith is unconstitutional and void. Congress having power to regulate the whole subject, regulates it as much by what it leaves without any regulation, as by what it expressly provides for. The will of Congress is equally expressed in both cases. It cannot be said that a State has a right to step in, and by way of compliment, fill up by its own legislation what is not actually occupied by that of Congress. Such was the doctrine maintained by the Supreme Court in Houston *vs.* Moore, 5 W. 1—21 and 22 ; Gibbons *vs.* Ogden, 9 W. 1—196 to 122, and Holmes *vs,* Jennison, 14 Pet. 540, 574 to 579."

In Moore *vs.* Veazie, 32 Maine 363, the Court says, "The power given to Congress to regulate commerce with foreign nations, and among the States, includes the power to regulate navigation with foreign nations and among the States, and extends both to salt and fresh water, and beyond as well as within the ebb and flow of tides. It is, however, restricted to such waters as can be employed in commerce between a State and foreign nation or some other State."

In the case of the State *vs.* North and Scott, 27 Mo. 473, the Court says, "It would be a bold proposition, that the States of the Union have a concurrent power, in the regulation of commerce, with the Congress of the United States in all matters but those in which there is an express prohibition on them by the

Constitution." Again, at 476, the Court says, "But whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of levying duties on imports."

In a still later case, viz: Gray *vs.* Clinton Bridge, *et al*, 7 American Law Reg., No. 3, 153, in the C. C. U. S. for Iowa, the Court, (Judges Miller and Love presiding,) says, "The wonderful growth of that commerce (inter-State) since it has been placed exclusively under the control of the Federal Government, has justified the wisdom of our fathers. But are we to remit the most valuable part of that commerce again to the control of the States, and to all the consequent vexations and burdens which the States may impose through whose territories it must be carried on? And must all this be permitted because the carrying is done by a method '(Railroads)' not thought of when the Constitution was framed."

And in a still later case decided by the Supreme Court of the United States, viz: Hinson *vs.* Lot, 8 Wal. 151, says, "That Court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until some regulation on the subject had been made by Congress. But assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce, if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, *we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.*" "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the Constitution just mentioned."

In Holmes *vs.* Jennison, 14 Pet. 574, C. J. Taney, when speaking in relation to concurrent power, uses this language, "But when an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, then the authority to the Federal Government is necessarily exclusive, and the same power cannot be exercised by the State."

And in Sturges *vs.* Crawenshield, 4 Wheat, 193, C. J. Marshall remarks on the same subject, "Whenever the terms in which a power is granted to Congress, or the nature of the power require that it should be exercised exclusively by Congress, the subject is as exclusively taken from the State Legislatures as if they had been forbidden to act."

In relation to the License Cases, 5 H. 504, upon which decision the Supreme Court of Iowa, in Santo, *et al*, *vs.* The State, laid much stress, and in fact bases its opinion. (It must not be forgotten that the laws, the constitutionality of which was tested in those cases, were license laws. The question of prohibition was not before the Court,) It may be well to remark that the same Judges who decided that case also decided the Passenger cases, 7 H. 283. As we have already seen in those cases, the majority of the Court, viz: Judges McLean, Catron, McKinley, Grier and Wayne, held the power of Congress over commerce among the States to be exclusive, and the Supreme Court in Woodruff *vs.* Parham, 8 Wal. 139, remarked in relation to the License Cases, "The separate and diverse opinions delivered by the Judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have argued was before the Court, and seemed to require solution."

The cases above cited establish unquestionably, at least, two points—

1st. That Congress possesses exclusive power over commerce among the States, and that the States can exercise no part thereof, even though Congress has not acted upon the subject; and,

2d. That decisions in the License Cases, 5 H., 504, and Wilson *vs.* Blackbird Creek, Marsh Co., 2 Pet. 251, so far as they refer to the power of Congress over commerce among the States, were overruled in the Passenger cases, 7 H. 283.

From the language used by the Supreme Court of Iowa, in Sonto, *et al, vs.* The State, 2 Iowa 202, above quoted, it is safe to conclude, that that Court would have rendered a contrary decision, had it been convinced,—

1st. That Congress possessed exclusive power over commerce among the States, and that the States cannot exercise any part thereof, even though Congress has failed to legislate upon the subject.

2d. That Congress had legislated upon the subject, and that there was a collision between the regulations of commerce made by Congress and those made by the State of Iowa.

That the law under consideration is a regulation of commerce no one will stop to question. It prohibits the sale of all intoxicating liquors, excepting foreign importations, for general purposes, and in the language of C. J. Taney, in the License Cases, 5 H. 578, it "acts directly upon an import from one State to another, while in the hand of the importer for sale, and is therefore a regulation of commerce acting upon the article while it is within the admitted jurisdiction of the General Government, and subject to its control and regulation."

The next question to answer, is, has Congress legislated upon the subject of commerce, and do those regulations made by Congress conflict with the statute under consideration? It having been already established that the statute of Iowa for the suppression of intemperance, is a regulation of commerce, what has congress done on that subject? It has enacted laws regulating the "Construction and equipment of steamboats," and for "the security of the lives of passengers on steamboats, upon bays, lakes and rivers of the United States." Acts approved March 3d, 1843, 5 Stat. 626, and August 30th, 1852, 10 Stat. 61. It has enacted, in the act for the admission of Iowa into the Union, approved March 3d, 1845, Revision of 1860, 965, Sec. 3, as follows: "and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well as to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the State of Iowa." Thus it appears that Congress has not only enacted laws regulating commerce among the States

so far as it thought proper, but it has positively prohibited the State of Iowa in said "act of admission" from enacting any laws for the regulation of commerce on the Mississippi river, by declaring that river and all navigable waters leading into it, public highways and forever free to all citizens of the United States of "any tax, duty, impost or toll, imposed by the State of Iowa." If the State of Iowa cannot regulate commerce carried on the Mississippi, it certainly cannot regulate that carried on land. One would be inconsistent with the other. It would be more than folly for the State to permit the importation and sale of property carried into the State by steamboats, which it is bound to do under the act of admission, and prohibit the importation and sale of property carried into the State by railroads. There is no difference between prohibiting the sale of an import and a tax high enough to effect a prohibition. Either would be a regulation of commerce, and comes within the prohibitions of the act for the "admission of Iowa."

It having been established that the act is a regulation of commerce, and involves a principle which necessarily leads to actual commercial non-intercourse, and that Congress has exclusive power over commerce among the States, and that States can exercise no part thereof; that Congress has legislated on the subject so far as it thought proper, and that there is a collision between the regulations of commerce made by Congress and those made by the State of Iowa, the act is in conflict with the provision of the Constitution and the laws of the United States above quoted. But it is claimed that a State Legislature, under the authority of the police power of a State, may counteract the commercial power of Congress. I deny the proposition. The police power cannot give the State authority to prevent the importation of any article of property that belongs to foreign or inter-State commerce, which is so recognized by the United States Government. For if a State possesses the authority, under the police power, to declare what shall and what shall not be lawful inter-State or foreign commerce, or what article of property shall belong to commerce, as it does in this law, then a State may control the commercial power of Congress, and the Federal Government would be utterly helpless and at the mercy of the States.

For a State may, at its discretion, prevent the introduction of any class of property within its borders it wishes. All it has to do, is to declare, by legislative enactment, that a certain class of property is injurious to the health and morals of the community, and that it is a nuisuance, and shall not be imported, sold or kept for sale, and it is done, and the powers of Congress are set aside.

On this question, hear Chief Justice Taney in the License Cases, 5 H. 583. He says, "And when the validity of a State law, in making a regulation of commerce, is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can a Court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."

It is claimed that the statute of Iowa for the suppression of intemperance is a police regulation. If it was such a regulation as operated solely upon the internal affairs of the State, and did not absolutely forbid the sale of a certain class of property, it would come within the police power, but does it more than that; it forbids the sale and the keeping for sale of intoxicating liquors, whether they are manufactured in this or imported from another State, and is therefore a regulation of commerce, and hence null and void.

Now, if intoxicating liquor does not belong to commerce—that is, if it has no commercial qualities, then the State may possess the right, under the police power, if not to prevent, to at least regulate its introduction and sale; but if it is an article of commerce—that is, if it is recognized as such, and as such regulated and taxed by the United States Government, it is exclusively under the absolute control of Congress, and a State cannot act upon it in any manner whatever until it becomes commingled with the property of the State, then a State may tax the same or require a license before it can be sold, but it cannot be taxed higher than any other property of the same value. For the commercial power of Congress and the police power of the States must, to give

both force and effect, exist independent of each other. "That is to say," to use the language of Justice Catron, in the License Cases, 5 H. 600, "that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce, is within the jurisdiction of the United States."

Again, at 608, he says, "For the sake of convenience, the views on which this opinion proceeds, will be briefly re-stated :"

"1st. It is maintained that spirits and wines are articles belonging to foreign commerce and commerce among the States ; and that Congress can regulate their introduction and transmission through the States, so long as they belong to either class of such commerce, but no further."

"2d. That the police power of the States was reserved to the States, and that it is beyond the reach of Congress ; but that such police power extends to articles only which do not belong to foreign commerce or to commerce among the States at he time the police power is exercised in regard to them ; and that the fact of their condition is a subject proper for judicial ascertainment."

On this subject see License Cases, 5 H. 589 to 592 ; Passenger Cases, 7 H. 424 to 427 ; Wynehamer *vs.* The People, 3 Ker. 439 ; The People *vs.* Toynbee, 2 Park, C. R. 361 to 364 ; City of New York *vs.* Miln, 11 Pet. 157.

Sec. 7, Art. II, is null and void because it prevents the free and untrammeled commercial intercourse among the States and with foreign governments, by requiring the importer to go to the expense and trouble of furnishing the common carrier with a copy of the certificate authorizing the importer to sell such intoxicating liquor, certified by a Justice of the Peace to be correct, and should the carrier bring such liquors into the State of Iowa without first procuring or being furnished with such certificate, he renders himself liable to a criminal prosecution. This applies to all importers of liquors. It makes no distinction between the domestic and foreign importer. Both are taxed alike. Both are required to furnish certificates. It is true that Sec. 2, Art. I, provides for the sale of foreign imported liquors, but it does not

provide how such liquors are to be brought into the State ; that is provided for in the section under consideration, by imposing a tax on the importer in the shape of a fee to be paid for the required certificate, before the carrier is allowed to bring such foreign liquors into the State. It is a tax on imports. A tax on the importer is equivalent to a tax on the import, and comes within the rule laid down in Brown *vs.* Maryland, 12 W. 448, "Any charge on the introduction and incorporation of the article into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation." Neither can a citizen of Iowa import liquors from another State for his own private use without taking out the certificate authorizing him to sell liquors, and furnishing a certified copy of the same to the common carrier. Gray *vs.* The Clinton Bridge, *et al.* A. Law, Reg. Vol. 7, No. 3, 149, Halderman *vs.* Beckwith, 4 McLean, C. C. R. 295 ; Crandall *vs.* The State of Nevada, 6 Wal. 44, 48 and 49.

Sec. 1, Art. III, is repugnant to Art. I, Sec. 8, and Art. 14, Sec. 1, of the U. S. Constitution, because it discriminates in favor of the citizens and products of the State of Iowa as against citizens of the United States and the products of other States, by providing for the "manufacture and sale of beer, cider from apples, or wine from grapes, currants, or other fruits grown in this State." This section evidently prohibits the sale of wine manufactured in the State of Iowa from grapes or currants grown in a sister State. In order to legalize the sale of wine, it must be manufactured from grapes, currants or other fruits grown in the State of Iowa. The products of a sister State cannot be manufactured into wine in this State. Hence there is an unjust discrimination in favor of the products of Iowa as against all the other States, which brings it within the rule laid down in Woodruff *vs.* Parnham, 8 Wal. 140; Hinson *vs.* Latt, 8 Wal. 150, 151, 152, and State of Mo. *vs.* North & Scott, 27 Mo. 464, 473, 476, 478, 480 and 481. See argument 468.

As an additional support of the several positions in relation to the commercial power of Congress, see : Gibbons *vs.* Ogden, 9

W. 186 to 222; Brown *vs.* Maryland, 12 W, 439 to 449; License Cases, 5 H., C. J. Taney's opinion, 574, 577, 578, 582 and and 583; Passenger Cases, 7 H. 394 to 397, 401, 403, 404, 406, and 407, J. Wayne, 410 and 412, J. Grier, 464, and C. J. Taney, 492; Steamship Co. *vs.* Port Warden, 6 Wal. 31, Story on the Constitution, 2 Vol., Sec. 1065, 1067, 1071 and 1072; Wynehamer *vs.* The People, 3 Ker. 399.

IV.

Sec. 15, Art. I, is null and void, because,—

1st. It forbids the maintainance of an action for the recovery of intoxicating liquors or the value thereof. Preston *vs.* Drew, 33 Maine 562.

2d. It impairs the obligations of contracts, because it denies a remedy for the enforcement of contracts made before the law took effect, which were not to be executed until after the law took effect. McCormick *vs.* Rush, 15 Iowa 130; Chicago *vs.* Sheldon, 9 Wal. 55, and The City *vs.* Lanson, 9 Wal. 477; Dartmouth Col. *vs.* Woodward, 4 W. 578, Story on Constitution, Sec. 1368 to 1393; Gelpecke *vs.* Dubuque, 1 Wal. 175; Harringer *vs.* Tama County, 3 Wal. 294.

V.

It is null and void, for the reason it was not enacted in accordance with Art. 3, Sec. 16, 17 and 26 of the Constitution of the State of Iowa. Sec. 18 of the act provides that the question of prohibiting the sale and manufacture of intoxicating liquors shall be submitted to the legal voters of the State of Iowa, for their assent and approval, and if a majority of the votes cast shall be for the prohibitory liquor law, then the act shall take effect on the first day of July, 1865. Such submission was a plain violation of the Constitution, and rendered the act null and void. See Chief Justice Wright's opinion in Santo, *et al, vs.* The State of Iowa, 2 Iowa, 223; Bice *vs.* Foster, 4 Harring, 289.

VI.

It is in conflict with Art. I, Sec. 6, of the Constitution of the State of Iowa, which requires, "All laws of a general nature shall have a uniform operation, &c." In Geebrick *vs.* State of Iowa, 5 Iowa, 497, the Court held the act "for the suppression of intemperance" to be a general law, hence, to be valid, it must be uniform in its operation. Can a law be deemed uniform in its operation that discriminates in favor of the rich as against the poor man, by providing for the sale of foreign intoxicating liquors in the original casks; that declares an article of property under certain circumstances a nuisance, and under others it declares it is not a nuisance—a change of ownership or location, not ingredients, is all that is required to work this wonderful change, and that grants exclusive privileges and immunities to all citizens of the State of Iowa who are not engaged in the business of keeping a hotel, saloon, eating house, grocery and confectionary store? Geebrick *vs.* The State, 5 Iowa, 491; McCormick *vs.* Rush, 15 Iowa, 129, Const. Debates, Iowa, Vol. 1, 200.

VII.

1st. It is in conflict with the patent laws of the United States because it makes no distinction between liquors or bitters possessing intoxicating qualities, that are patented and those that are not patented under the laws of the United States. Its prohibitory features operate alike upon both.

Ex parte Major J. Robinson, U. S. C. C. for the District of Indiana, Justice Davis presiding, Chicago Legal News, Vol, 2,297.

2d. If the United States Marshal, by order of the U. S. District or Circuit Court, for the District of Iowa, seize intoxicating liquors, that have been forfeited under the internal revenue laws of the United States, can he sell such liquors in the State of Iowa contrary to the prohibitory statute? If so, what title and what rights does the purchaser receive? Can the purchaser thereof sell them in the State of Iowa? And if the Marshal cannot sell such liquors in the State of Iowa, or if he can sell them and the

purchaser thereof cannot sell them under the title he receives from the United States, does not the act prohibiting such sale, in either case, interfere with the enforcement of the laws of the United States for the collection of internal revenue for the support of the Federal Government, and therefore render it null and void? McCulloch *vs.* Maryland, 4 W. 316.

WM. T. DITTOE,
Attorney for Defendant.

Supreme Court of United States.

F. BARTEMEYER, Sr.,
vs.
THE STATE OF IOWA,
} Assignment of Errors.

Afterwards, to-wit, on the first Monday of December, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said F. Bartemeyer, Sr., by C. Whitaker and Wm. T. Dittoe, his attorneys, and says, that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1st. That the Supreme Court of the State of Iowa erred in affirming the decision of the Circuit Court of the State of Iowa, in and for Scott County, overruling the demurrer of the defendant to the information.

2d. That the Supreme Court erred in affirming the decision of said Circuit Court, overruling the defendant's motion to dismiss this cause and quash these proceedings.

3d. That said Supreme Court erred in affirming the decision of said Circuit Court, overruling defendant's motion in arrest of judgment.

2th. That said Supreme Court erred in affirming the decision of said Circuit Court, sustaining the plaintiff's verbal motion, made in open Court and entered of record, for the conviction of the defendant on the facts alleged in his written plea filed in this case, and holding said written plea insufficient in law to constitute a defense.

5th. The said Supreme Court erred in affirming the judgment rendered by said Court against the defendant.

6th. Because the act of the legislature of the State of Iowa, with the amendments thereto, entitled, "An Act for the suppression of intemperance," is opposed to the common weal of the United States, and in conflict with and in violation of the Constitution and laws of the United States.

Whereupon the said F. Bartemeyer, Sr., prays that the judgment aforesaid may be reversed, annulled and held for naught, and that he may be restored to all things which he has lost by reason of said judgment.

C. WHITAKER and WM. T. DITTOE, Att'ys for Pl'tff.

Supreme Court of the United States.

No. 394.—December Term, 1871.

F. BARTEMEYER, Sr., Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

In error to the Supreme Court of the State of Iowa.

APPELLANT'S REPLY TO DEFENDANT'S ARGUMENT.

WM. T. DITTOE, *for Appellant.*

ARGUMENT.

In reply to the printed argument of the counsel for the defendant in error, I submit that the cases cited by the counsel, viz: State vs. Backman, State vs. Munzenmeyer, State vs. Baylor, State vs. Stutz, License Tax Cases, 5 Wall., 462 and 475, do not reach the case at bar. The question before this court in those cases was, whether a license granted by the United States authorized the sale of liquors, notwithstanding the statutes of the several states. The points settled in those cases do not apply in this case. We rest our defence entirely on different grounds, some of which could not have been raised at that time, because the 14th amendment to the Constitution of the United States had not then been adopted, and this court did not then possess jurisdiction to decide the questions raised by the plaintiff in this case.

As to the other cases cited by counsel the court will find our answer in our original printed brief.

It is claimed that the state has the right to enact such police regulations as it may deem necessary for the preservation of the health and morals of the community. That is true to a certain extent.

But there is a limit to this power. If there were not, we would be left wholly at the mercy of the vacillating whims of the legislature. Where is that limitation? It is found in the Constitution of our country, which provides that a citizen of the United States shall not be deprived of his "life, liberty, or property without due process of law." The police power can only be used in cases of the most urgent necessity. It is cases of overruling necessity that alone legalizes that power. It can be resorted to only for the general safety and support of society, and can in no case conflict with the Constitution. It is intended to protect and not destroy rights guaranteed by that instrument. The Constitution protects all our absolute rights equally alike. The right to acquire, possess, and dispose of property is as sacred, in the eye of the Constitution, as the right to enjoy life and liberty. So is the right to enjoy liberty as sacred as the right to enjoy life. It is as much the duty of the government to protect the one as the other; and the legislature is bound, by all the sacred obligations that bind society together, to protect and to secure the unqualified enjoyment of all those rights. It cannot abolish or abridge one to advance the interest of the others. The legislature can no more do that than it can abolish the Constitution itself. Neither right can be made to yield to the other. Could the legislature do this our written constitutions are a complete failure, and a law which declares the exercise of one of the fundamental rights, protected by the Constitution, a crime, infringes the express rule of our system of government, and is not within the general powers of the legislature over crimes.

The first Continental Congress declared, in 1774, by solemn enactment, "that the inhabitants of the colonies were entitled to all the rights, privileges, and immunities of natural born subjects of Great Britain, and entitled to the common law of England."—(Kent, 10 ed., 1 vol. 615.)

The courts of Iowa have declared the common law to be in force in Iowa.—(O'Farral vs. Simplat, 4 Iowa, 381; The State vs. Twegood, 7 Iowa, 252.)

That the common law is the birthright of American citizens no one will presume to deny—at least that portion of it engrafted in the constitutions. And all rights protected and deemed sacred by the common law cannot be taken from the people without their express consent. It therefore follows that to deprive a person of any one of his common law rights—rights which existed prior to the adoption of the Constitution, and which are not taken away by that instrument—it must be done in accordance with the rules of common law as established when the Constitution was adopted.

Is it conducive to morals of the community to enact and enforce a law that legalizes common cheats, and induces, aids, and protects persons in the commission of the crime of larceny, obtaining goods under false pretences, and in the violation of the obligation of contracts? A careful perusal of this law must convince the most skeptical that the above is true.

Is it conducive to the morals of the community to have a law on the statute books that is seldom enforced except through vengeance on the part of the prosecutor?

Is it conducive to the health of the community to have a law on the statute books that cannot be enforced, and thereby prevent the passage of a good inspection law? A law that will give the people pure liquors to drink; for they will drink, and if the legislature is so much concerned about our health, let it enact an inspection law which will do more good than all such laws put together.

There is a wide difference between the law held con-

stitutional by the Supreme Court of Iowa, in "Our House No. 2 vs. State, 4 Greene, 172, and Zumhoff vs. The State, Ibid., 326, and cited by that court, deciding this case to sustain their decision, and the present law. The first regulated the sale of liquors by retail only, and the second prohibits the sale absolutely. The first does not of itself work a destruction of property, and the second does. The second forbids importations except for certain specified purposes, and the first admits it without limitations. The first permits the manufacture and traffic in these commodities as articles of merchandise, and the second forbids such manufacture and traffic.

I most respectfully submit that the case at bar presents many new and very important questions for the consideration of the court; that the record does show that the written plea, filed in the court below by the plaintiff in error, was all the evidence given and received on the trial of this cause, (see Trans., 4, 6, and 7;) that it does not alter the rights of the plaintiff in error, even though the record does fail to show that fact, for if the law is null and void for any purpose whatever, it is null and void for all purposes, and that the decision of the Supreme Court of Iowa should be reversed.

WM. T. DITTOE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

—:o:—

F. BARRETTER, Sr., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA, DEFENDANT IN ERROR

—:o:—

ARGUMENT OF HENRY O'CONNOR, ATTORNEY-GENERAL OF IOWA, *For Defendant in Error.*

G. W. Edwards, State Printer, Des Moines.

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WM. T. DITTOE,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

——:o:——

F. BARTMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA, DEFENDANT IN ERROR

——:o:——

ARGUMENT OF HENRY O'CONNOR, ATTORNEY-GENERAL OF IOWA, *For Defendant in Error.*

G. W. Edwards, State Printer, Des Moines.

Supreme Court of the United States.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

——: o :——

F. BARTMEYER, SR., PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA DEFENDANT IN ERROR.

——: o :——

ARGUMENT OF HENRY O'CONNOR, ATTORNEY-GENERAL OF IOWA, *For Defendant in Error.*

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STATEMENT OF THE CASE.

This case comes from the Supreme Court of the State of Iowa, upon writ of error, and arises under what is known as the Prohibitory Liquor Law of that State. So much of the Statute in question as is material to the questions involved in the case at bar is here inserted:

(Sec. 6.) "If any person by himself, his clerk, servant or agent, shall for himself or any person else, directly or indirectly, or on any pretence, or by any device, sell, or in consideration of the purchase of any other property give to any other person any intoxicating liquor, he shall be

deemed guilty of a misdemeanor, and shall on his first conviction for said offense, pay a fine of twenty dollars and the costs of prosecution, and shall stand committed ten days unless the same be sooner paid. On the second conviction, a fine of fifty dollars and stand committed thirty days, unless the same be sooner paid, and on the third and every subsequent conviction, he shall pay a fine of one hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail not less than three, nor more than six months, and in default of payment of the fines provided for the first and second convictions under this section the person so convicted shall not be entitled to the benefit of section 3268 of the Code (Poor Convict's Act) until he shall have been imprisoned sixty days, all clerks, servants and agents of whatsoever kind, engaged in the manufacture, sale or keeping for sale in violation of this act, of any intoxicating liquor, shall be charged and convicted in the same manner as principals, may be and shall be subject to the penalties herein provided. Indictments and information under this sections may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged, as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions however mentioned in this section shall be construed to mean convictions on separate indictments, or informations."

Revision, section 1562.

Another section of the act provides against the manufacture of liquors, and still another against keeping liquors with intent to sell. The act also provides that prosecutions under it may be had before Justices of the Peace. A subsequent amendment provides that, under certain conditions and restrictions, liquor may be sold for medicinal, mechanical, and culinary purposes.

Acts of 1857, ch. 157, p. 231.

A later amendment, passed April 10th, 1858, by the the Sixth General Assembly, excepted beer from the list

of intoxicating liquors; and excepted, also, cider and wine manufactured from apples and grapes grown in the State of Iowa.

The above embraces substantially the provisions of the Iowa Prohibitory Liquor Law.

On the 21st of March, 1870, the plaintiff in error, F. Bartmeyer, Sen., was charged, before a Justice of the Peace, in Scott county, Iowa, with selling intoxicating liquors of the kind prohibited by law, in violation of the provisions of section 1562 of the Revision (that being the section first above quoted in full). He was convicted before the justice; from the judgment of the justice he appealed to the circuit court, where, upon a trial *de novo*, he was again convicted. From this latter judgment he appealed to the Supreme Court of Iowa; and at the June term, 1871, of the Supreme Court, the judgment of the Scott county circuit court was affirmed. The opinion of the Iowa Supreme Court is set out in form of appendix to this brief.

ARGUMENT.

As I read the record of this case, may it please the court, I find myself wholly unable to discover in it any question that has not been again and again decided by this court, settled under this particular statute, in cases from Iowa, viz:

State v. *Bachman.*
State v. *Munzenmeyer.*
State v. *Bayon.*
State v. *Stutz.*

State *vs.* Bayon, and State *vs.* Stutz, decided at December term, 1867, of this court not reported, as no opinions were written except a simple affirmance, and under similar statutes from many other States in the Union; certainly

from Massachusets, Rhode Island, New York, New Jersey, and Pennsylvania.

McGuire *vs.* The Commonwealth, 3d, Wallace, 387.

Mr. Justice Nelson, in delivering the opinion of the court in the above case, says:

"Whatever might be the effect of this license as to the rights under it in the absence of other provisions of the act of Congress, a question not involved in the case, and therefore not material to be noticed; it is quite clear that it conferred no right or authority on the defendant below, and hence furnished no defense to the indictment under the laws of the State."

"The 67th section of the act of Congress enacts that no license hereinbefore provided for is granted, shall be construed to authorize the commencement or continuation or any trade or business occupation or employment therein, mentioned within any State or Territory of the United States, in which it is or shall be specially prohibited by the laws thereof, or in violation of the laws of any State or Territory. In view of this provision, continues the learned judge, it is in vain to attempt to give power or effect to the license against the State law; and hence the authority derived from it, upon which the defendant relied for his defense in the court below, fails."

See also the license tax cases, 5th, Wallace, 462, and

Pervear *vs.* The Commonwealth, 5th, Wallace, 475.

In the license tax cases above cited, Chief Justice Chase, in delivering the opinion of the court, uses this language:

"This court can know nothing of public policy except from the Constitution and laws, and the course of administration and decision. It has no legislative powers; it cannot amend or modify any legislative acts; it cannot examine questions as expedient or inexpedient as politic or impolitic. Considerations of that sort must, in general, be addressed to the Legislature. Questions of policy determined there are concluded here.

"The Legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets, and in liquors. These enactments, so long

as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy, is, therefore, a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If intended in the latter sense, the proposition is one of which courts cannot take cognizance."

Much further back in the history of this court, its decisions are found to be uniform and emphatic on the right, the unqualified and exclusive right, of the States to enact such laws as the wisdom of the Legislature might deem necessary to the preservation of the health, morals, and good order of society, and such police and penal statutes as they deemed necessary to regulate the personal conduct of the inhabitants.

Now has this court stopped with the mere declaration of the right of the United States. It has also, lent the sanction of its warm approval, of the soundness and wisdom of the State policy that dictated the enactment of laws for the suppression of the traffic in intoxicating liquors, the traffic and the use of which have been the two fruitful source of so much misery, vice, and crime from the earliest days of the Republic to the present time.

In the leading case on this question in the State of Iowa: *Santo, et. al.*, vs. *The State*, 2d, Iowa, 202.

The very learned and elaborate opinion of the court delivered by the late Justice Woodward is replete with citations from the decisions of this court and quotations from the languages of the judges, delivering its opinions, citing the case of *New York* vs. *Miln*, 11th Peters, 102.

This language of the opinion is given:

"It is not only the right but the bounden and solemn duty of a State to advance the happiness the safety and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated,

that all those powers, which relate to merely municipal legislation, or what may, perhaps, be more properly called internal police, are not thus surrendered or restrained, and that consequently in relation to these, the authority of a State is complete, unqualified, and exclusive."

And to the same purport is cited the cases of *Thurlow* vs. *The State of Massachusetts*, *Fletcher* vs. *The State of Rhode Island, and Pierce* vs. *The State of New Hampshire* 5, Howard, 504.

In the cases just cited Chief Justice Taney uses these plain and pregnant words.

"But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation or diminish the profits of the importer or lessen the revenues of the general government, and if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

The case at bar presents the question in no new aspect, and in the light of these uniform decisions any attempt at argument on this side of the question would be superfluous if not impertinent, I respectfully submit that the judgment of the Supreme Court of Iowa should be affirmed.

HENRY O'CONNOR,

Attorney-General of Iowa, for defendant in error.

OPINION OF THE SUPREME COURT OF IOWA, JUNE TERM, 1371.

No. 3989.

THE STATE OF IOWA
vs.
F. BARTMEYER, Sr.

COLE, J.

The counsel for appellant has favored us with an enlaborate printed argument, in which he assails the act for the suppression of intemperance, as opposed to the common weal of the State of Iowa and the United Srates, and as in conflict with and in violation of the Constitution of the State of Iowa, and the constitution and laws of the United States.

We regard these questions as settled by the former decisions of this court, and in view of the large amount of business before us must content ourselves with simply referring to and following them :

Our House, No. 2 v. *The State*, 4 Green. 172.
Lyondoff v. *The State*, Ibid. 526.
Santo v. *The State*, 2, Iowa, 165.

It is, however, also urged that the plea of defendant admitting the sale, and which was read in evidence at the trial, avers that the defendant was the owner, holder, and

possessor in the State of said intoxicating liquor, at and prior to the passage of the law under which the prosecution was had; even if this latter fact would constitute a defense, which we do not determine yet, it would not help the defendant's case, because the transcript fails to show that the admissions and warrants of the pleas was *all the evidence.* Other testimony may have shown that he did not so own and possess them.

AFFIRMED.

Dec 22 1871

Phillips - motion to dismiss

Mr Justice Clifford

FREEBORN & CO.,

v.

SHIP PROTECTOR.

SUPREME COURT UNITED STATES.

The beginning and end of the late civil war in reference to the Statute of Limitations.

Sept 16 1872 Grant

P. PHILLIPS,

Solicitor for Appellee.

Motion

Mr Miller

In the Supreme Court of the U. S.

FREEBORN & Co.,
v.
SHIP PROTECTOR.

BRIEF OF P. PHILLIPS.

On motion to dismiss Appeal.

The decree in this case was filed in the Circuit of the U. S., at Mobile on 5 April, 1861. The present appeal was allowed on 6 May, 1871, and filed in Clerk's office at Mobile, 17 ~~June~~ May, 1871.

By the judiciary act the writ of error was applied to decrees in Chancery as well as judgments at Common Law, and it declares that "writs of error *shall not be brought*, but within five years from the rendering or passing the judgment or decree complained of."

It has been well settled that a writ is not "brought," within the meaning of this provision, until it is filed in the Court where the judgment or decree was rendered.

(Brooks v. Norris, 11 How., 204.)

It follows that the appeal which is substituted for the writ of error by the act of 1803 in Chancery cases, is not "brought" or taken until it is filed in the appropriate court; for by this act the appeal is subjected to the same

regulations as are imposed by the act of 1789, on writs of error.

The maxim, *contra non valentem agere, non currit prescriptio* has been heretofore applied to the statute of limitations, so as to exclude from its operation, the period of the late civil war.

The exact termination of that war has not heretofore been decided by this Court. The opinion in the case of Anderson, 9 Wall, 56; very carefully confines itself to the particular statute then before the Court.

By what test is the Court to arrive at the solution of this question? Is it to look to the action of the political department, or is it to determine it for itself as a matter of fact?

This is a very grave question, for if the former be the correct rule, it would be in the power of the political department to continue the exercise of war powers indefinitely.

The Constitution prohibits the quartering of soldiers on the citizen in "time of peace." Is there no judicial sanction to this important guarantee? May Congress quarter its soldiers on the citizen long after the cessation of all hostilities, when the courts are everywhere opened, and civil administration thoroughly organized? If this is a political question, and the Court is bound to follow the direction of the political department, then is it to take that direction from the executive or the legislative, or hold that the war continues until these two departments concur in a declaration of peace?

These questions are not merely speculative. There are proclamations of the President not easily reconcileable with acts of Congress which depend for their validity upon the existence of a state of war.

And when we consider that war powers supercede all Constitutional limitations, and sweep away all guarantees,

the importance of their determinations cannot be overstated.

We find this subject treated, in the Supreme Court of Pennsylvania, by Thompson, J., in an opinion delivered as early as 5 July, 1865, on a petition for a *habeas corpus* of 29 June, 1865.

The act of 1863 suspended the writ, "*During the Rebellion.*" Whether (says the Judge) the rebellion was at an end on the 29 June, 1865, is a *fact* to be judicially determined, like any other fact. It is not for the President only by proclamation. He is not authorized by any act of Congress to fix the status of the country. The power of suspension (of the writ) depends on the fact of the rebellion, and its continuance. It ceases with the rebellion, and that fact is as much within jndicial cognizance, as in any fact under which rights exist, and are held.

"There is abundant evidence in the current history of the times, that the rebellion no longer continues. We know that its organization is entirely destroyed; its armies captured or surrendered; its officers imprisoned or paroled. In addition we know that our own armies are being as rapidly mustered out as possible, civil government has been set up in all the rebellious States but one, and trade opened by proclamation with scarcely any restriction."

Commonwealth v. Frink, Am. Law Reg., 13, vol. 700.

The same views were held by Judge Trigg in a case arising under the act of 13 July, 1861, which declared intercourse to be unlawful "*as long as such condition of hostility should continue*," and a shipment of cotton made on 25 May, 1865, was therefore held to be lawful.

(Decatur Cotton Case.)

In Bigler vs. Waller, decided on the Circuit by the Chief Justice, he says: that the termination of the war is a question left open by the decisions of this Court. This being so, he adds:—"We think it right to take the establishment at Richmond of the adhering government of Virginia, as the recognized government of the whole State, as the *end of the war in this State*, to wit, 26 May, 1865. The period then to be excluded in the computation of interest is from 19 April, 1861, to 26 May, 1865."

Sept., 1870, Law Times, vol. 3, p. 157.

In South Carolina the question arose under the captured and abandoned property act, and the regulations of the Secretary, the Chief Justice again says—

"These regulations had relation only to a State of war," and then he adds—"Now actual hostilities between the insurgent States and the United States terminated practically in May, 1865."

(Callicott vs. McLeod, Record filed in Supreme Court, No. 289.)

These decisions are based upon the surrender of Lee on 9 April; of Johnson on 26 April; and of Kirby Smith, in Texas, on 26 May, 1865.

By the surrender of these armies, opposition to the Government was at an end, and the war had accomplished its only legitimate purpose, the preservation of the Union, and the restoration of peace.

If, on the other hand, the Court is to take its rule from the political department, we find that the president, who was authorized by act of Congress to determine what States or parts of States should be deemed and declared by him to be in insurrection, was necessarily by the terms of the grant empowered to declare what States or parts of States should cease to be in insurrection, and this power was exerted by him during the war, with the full acquiescence of Congress.

On 10 May, 1865, he issued a proclamation which reciting that of the 19 April, 1861, (declaring certain States in insurrection) announces that "armed resistance to the authority of this Government may be regarded as virtually at an end." (13 Stats., 757.)

Again on the 22 of same month the blockade is raised, and foreign commerce restored. (757.)

Again, on 29 same month amnesty and pardon is granted to those who had engaged in the rebellion. (758.)

On the 13 June, 1865, "all restrictions upon internal domestic and commercial intercourse" with the States lying east of the Mississippi river are annulled. (763.)

On the 21 June, 1865, the laws of the United States are directed to be put in force in Alabama, and the district judge is directed "to proceed to hold courts within said State, in accordance with the provisions of the act of Congress." (767.)

On 24 June, 1865, restrictions on trade west of the Mississippi river were removed. (769.)

On 29 August, 1865, the exceptions made in former proclamations as to articles contraband of war, were repealed, and trade and intercourse freed from all restrictions. (772.)

On 2 April, 1866, it is specifically proclaimed "that the insurrection which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, *Alabama*, Louisiana, Arkansas, Mississippi, *is at an end, and is henceforth* to be so regarded." (14 Stat., 812.)

As this did not include Texas, another proclamation of 20 August, 1866, was issued, which recited that of the 13 *June*, 1865, declaring that "the insurrection which heretofore existed in the several States before named,

except in Texas, was at an end, and was henceforth so to be regarded," and then declares that the insurrection was also at an end in this State.

The date 13 June is noted as erroneous. The proclamation intended to be referred to was that of 2 April, 1866.

This action of the executive, we repeat, is fully authorised by the powers conferred by the Constitution, the act of 19 April, 1861, and the subsequent acquiescence of Congress.

Looking to this action, as a guide, it is not possible to fix a later period for the termination of the war, so far as Alabama is concerned, than the 2 April, 1866.

If political action is to decide the termination of the war, we presume we are to apply to the same source of information for its commencement.

The proclamation of blockade was on 19 April, 1861, and the call for troops on the 3 May following. (12 Stat., 1258, 1260.)

On 13 July, 1861, it was enacted that "it may and shall be lawful for the President by proclamation to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and *thereupon* all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States shall cease and be unlawful, *so long as such condition of hostility shall continue.*" (12 Stat., 257.)

In pursuance of this authority the President issued his proclamation of 16 August, 1861, declaring intercourse to be unlawful, "*until such insurrection shall cease, or has been suppressed.*" (12 Stat., 1262.)

It would seem therefore that the mere blockade of the ports did not cut off intercourse between the States of an inland character. This did not occur until the issuing of the proclamation of the 16 August, 1861.

The mails of the United States, and the express companies, continued their service up to this date in most of the States. Contracts fairly entered into up to this period could not be invalidated on the ground of war.

If we are correct in this, then more than four months had elapsed after the decree, and before any impediment existed in taking the appeal; and conceding that the war only terminated with the Texas proclamation of 20th August, 1866, an appeal "brought" on 17th June, 1871, is not within the five years' limitation.

If, however, the party was free to act on 2d April, 1866, when the insurrection was specifically declared to be at an end in Alabama, "and henceforth so to be regarded," then even discarding the lapse of time prior to the war, the appeal is barred by law.

But it is a great concession to assume this date, for by the proclamations of 10th and 22d May and 13th June, 1865, as we have seen, the blockade was raised and all restrictions upon internal, domestic, and commercial intercourse were removed, and by that of 21st June, 1865, the Courts of the United States were opened in Alabama.

Taking this latter date, and discarding past time, the appeal in this case is six years (less a few days) subsequent to the decree.

The impediment produced by war does not extinguish the time which had previously run. The period of its duration only is to be *deducted.* This we take to be the rule in Hanger vs. Abbot, (6 Wall, 541.) The Court in the subsequent case of Levy vs. Stewart, (11 Wall, 254,) referring to the former case, states the decision thus:—"The time during which *the Courts of the States were closed* to the citizens of the rest of the Union is to be *excluded* in suits since brought from the computation of time fixed by statutes of limitation, though no such exception is expressly admitted in the limitation act."

To the same effect is the act of 11th June, 1864, (13

Stat., 123,) "the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

This is the rule of the civil law which defines suspension of prescription, as a time of rest or stay, (*temps d'arrêt*,) which only hinders the running of the prescription while the suspension lasts, and leaves in full efficacy the time already acquired, and which has only to complete itself when the cause of suspension ceases.

Marcadé de la prescription, Art. 2241, p. 117.

This is a jurisdictional question. The Court possesses no dispensing power. If the writ of error is brought a day after the five years, it is as fatal as if brought a year or ten years after the time. In such a case the Court can no more take jurisdiction than in a case where the amount in controversy does not exceed $2,000.

In the case of Walker vs. United States, the judgment was for the sum of $2,000. On motion to dismiss, the Chief Justice says—"We can no more take jurisdiction where the matter does not *exceed* $2,000, than we can when it is less than that sum. We have, therefore, no jurisdiction of this writ of error and it mnst be dismissed." 4 Wall, 164.

Giving the fullest scope to the maxim, *contra non valentem*, which protects against prescription while the parties is not free to act, and the question recurs when was he free to act?

First. We have the determination of this Court in the prize cases "where the regular course of justice is interrupted by revolt, rebellion or insurrection, *so that the courts of justice cannot be kept open*, then civil war exists."

The corrollary of this is that when the Courts can be kept open, *civil war does not exist.*

On the reversal of the attainder of the Earl of Lancaster, it was declared by parliament; "that regularly when the King's Courts were open, it is a time of peace in judgment of law." Hales, P. C., 499.

Second. We have the action of this Court in hearing and determing, in 1865, the causes which prior to the war had been brought up from the South, suitors were then held to a *strict prosecution of their legal remedies.*

Third. The proclamation of 16 August, 1861, which forbade intercourse, at the same time declared that intercourse should only remain unlawful *until the insurrection ceased.* As soon as it ceased, or was suppressed, all the rights of intercourse immediately revived by virtue of the proclamation itself.

Fourth. Immediately after the cessation of hostilities, post offices were reopened, mail contracts entered into, and the revenue system extended throughout these States.

Fifth. The proclamation of 10 May, 1865, that armed resistance was to be regarded as virtually at an end.

Sixth. The proclamations of the 22 and 29 May, restoring foreign commerce, and granting amnesty and pardon.

Seventh. The proclamation of 13 June, 1865, removing "all restrictions upon internal and domestic *intercourse and trade.*"

Eighth. The proclamation of 21 June, 1865, declaring the opening of the Courts of the United States in Alabama.

Ninth. The proclamation of 2 April, 1866, declaring the insurrection had ceased to exist in the State of Alabama and other States, "and is henceforth so to be regarded."

It would seem impossible to hold in the presence of

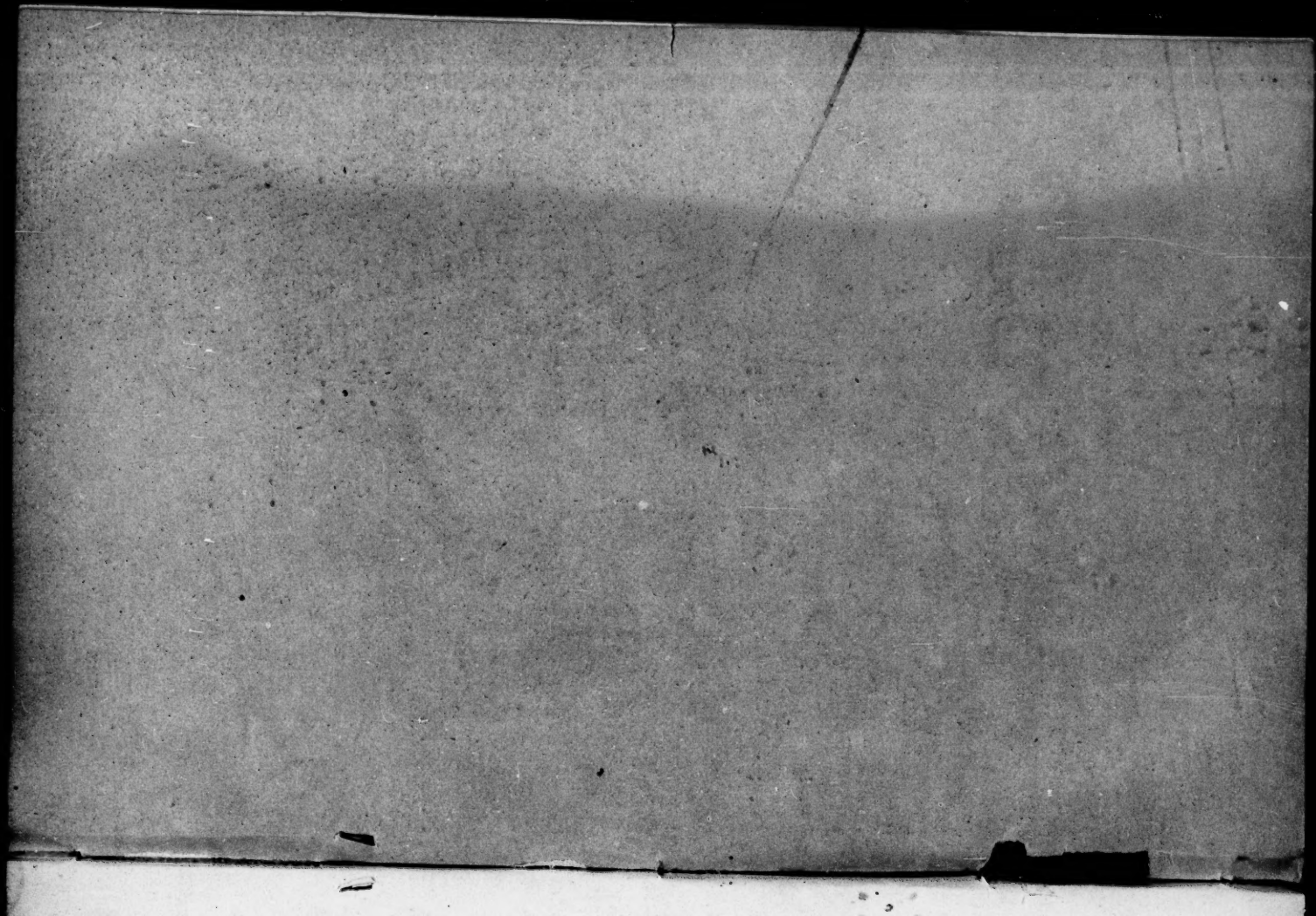
these facts, that the appellant was not free to act after the date of these transactions.

Judge Busteed was appointed in January, 1864, and the Clerk's office was opened as soon as the city of Mobile was occupied by the Federal forces. Court was opened at the December Term, 1865, and from that time onward regular sessions have been holden. The appellant could have applied for his appeal, either to this judge or to any justice of the Supreme Court, and this might have been done without even going to Mobile for this purpose. It was only necessary to send the citation there for service, and this could have been accomplished as soon as the city had surrendered. The war for all practical purposes in reference to intercourse and commerce was then at an end.

"Neither Congress nor the executive, nor the people, have acted upon the asumption, that intercourse between the people of the two sections in private civil affiairs has been unlawful since 13 June, 1865. Business then began to seek its old channels, new contracts were made, and old ones litigated and enforced in the courts of both sections."

Semmes v. Ins. Comp'y., 6 Bl. C. C. R., 458.

P. PHILLIPS,
for Appellee.



United States Supreme Court.

DECEMBER TERM, 1871.

No. 431.

WILLIAM A. FREEBORN & CO.
Libellants and Appellants.
vs.
Ship PROTECTOR, her Tackle,
JAMES C BELL,
Claimant—Appellee.

The case comes before the Court on two motions:

I—the motion of the appellee to dismiss the appeal upon the ground that it is not taken in time.

II—The motion of appellants to amend the libel by asking that the decree may be rendered as well for the account or demand "and interest and damages thereon."

1st. On motion to dismiss:

The Appeal, Bond, &c., were filed in the Circuit Court of the United States, for the Fifth Judicial Circuit and Southern District of the State of Alabama on the 17th day of May 1871.

The citation was served on the Messrs. Hamilton attorneys for appellee, on 18th May, 1871.

The Proclamation of President Lincoln, of the date of 16 April, 1861, recognized the existance of a state of war between the United States and the States mentioned in said Proclamation, of which Alabama was one.

Stewart *v* Kahn, 11 Wallace, 503.505.
United States *v* Wiley, 11 Wallace. 513 515

2nd. As Congress in its Legislation for the Army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on the subject should not be received as settling the question where private rights are affected by it Levy v Stewart 11 Wallace 253.

11 United States *v* Andersen 9th Wallace, 69, 70, 71 American Law Register 419. 428. 429. 30. 9 Wall 56

3rd. From April 5th, 1861, date of the decree in the Circuit Court, to May 17th. 1871, is ten years, one month and twelve days.

From 15th April, 1861, date of existence of war, to 20th August, 1866—its conclusion—is five years, four months and five days.

Deduct the latter from the former and the result is, four years, nine months and seven days, at the end of which time the appeal in this case was filed in the Circuit Court of the United States for the Southern District of Alabama.

4th. The Appeal has been properly taken:

In the case of *Brooks v Norris*, 11th Howard, 204, THIS COURT held, the writ of error is not brought in

the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the Inferior to the Appellate Court, and the period of limitation prescribed by the Act of Congress, must be calculated accordingly.

Conklins Practice, 641 642.

II.—It is moved in behalf of the appellant to amend the libel by asking that the decree may be rendered as well for the amount of the account or demand "and interest and damages thereon.'

In Weaver *v* Thompson, 1 Wallace, Jr. Rep. 343, an appellant in Admiralty was allowed to amend his libel in the Appellate Court so as to make a claim there for damages above costs caused by a vexatious appeal.

F. S. BLOUNT,

Proctor for Appellants.

Fig. 1.

Vertical cross section of FURNACE

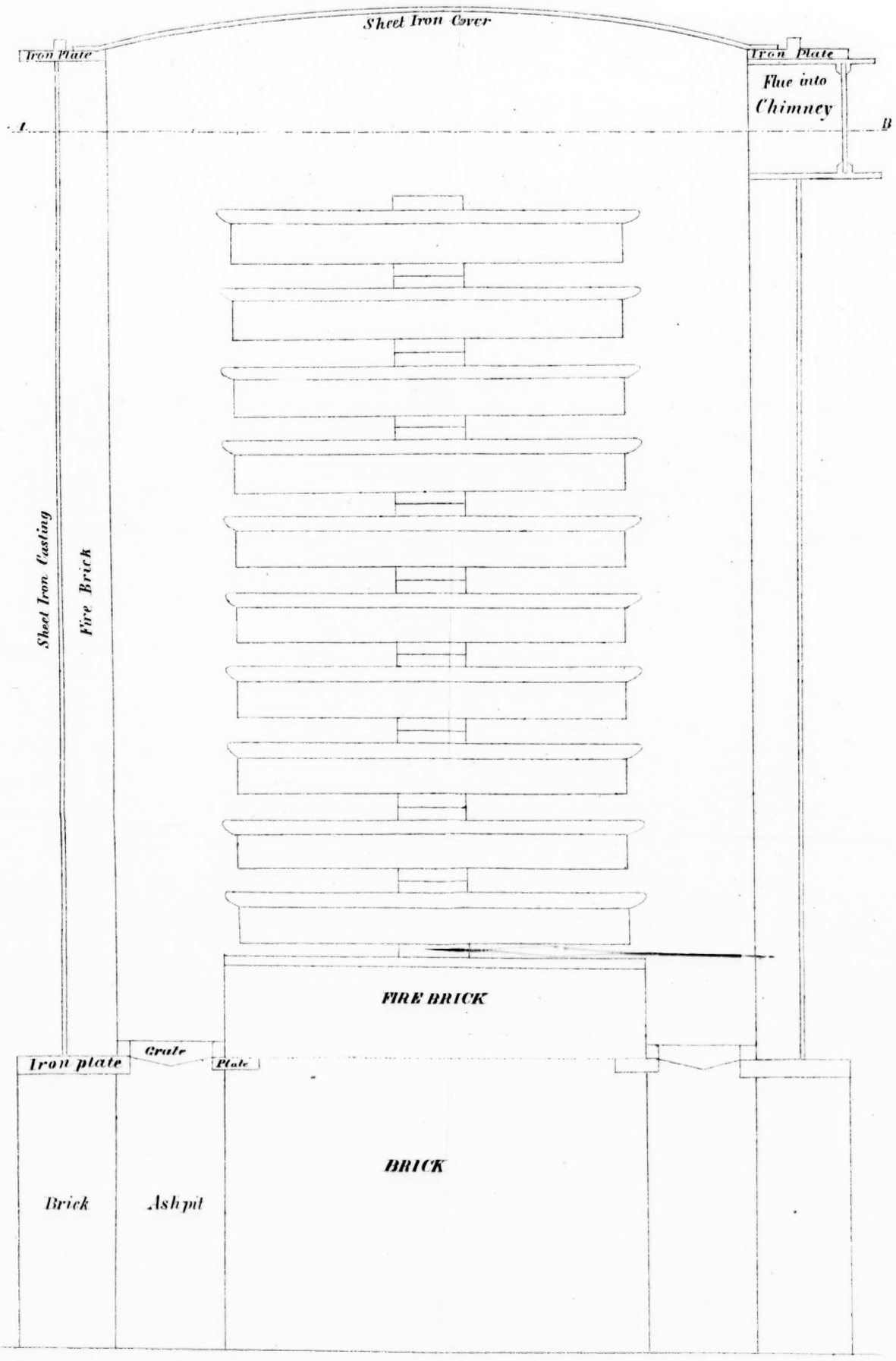
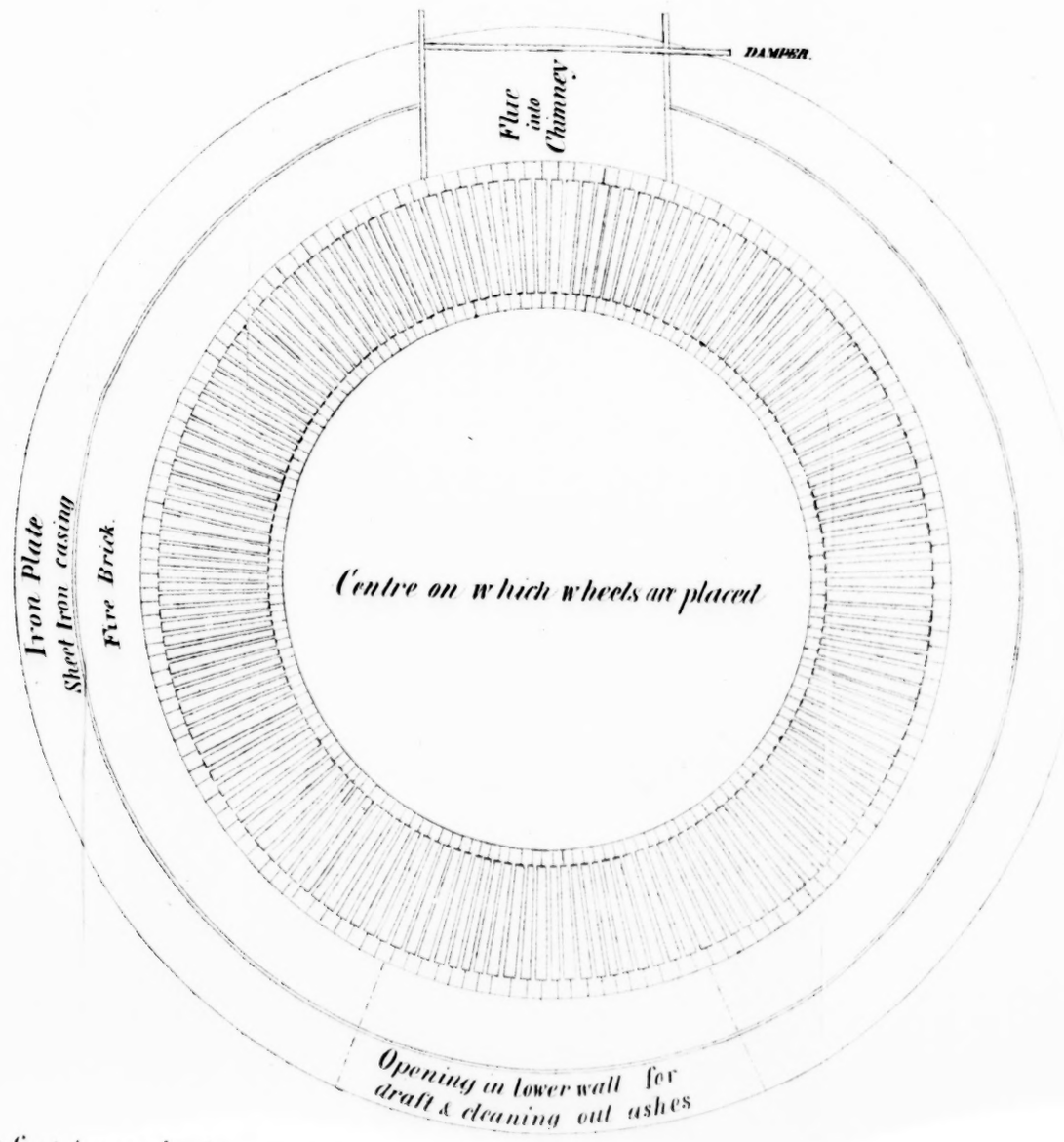


Fig. 2.

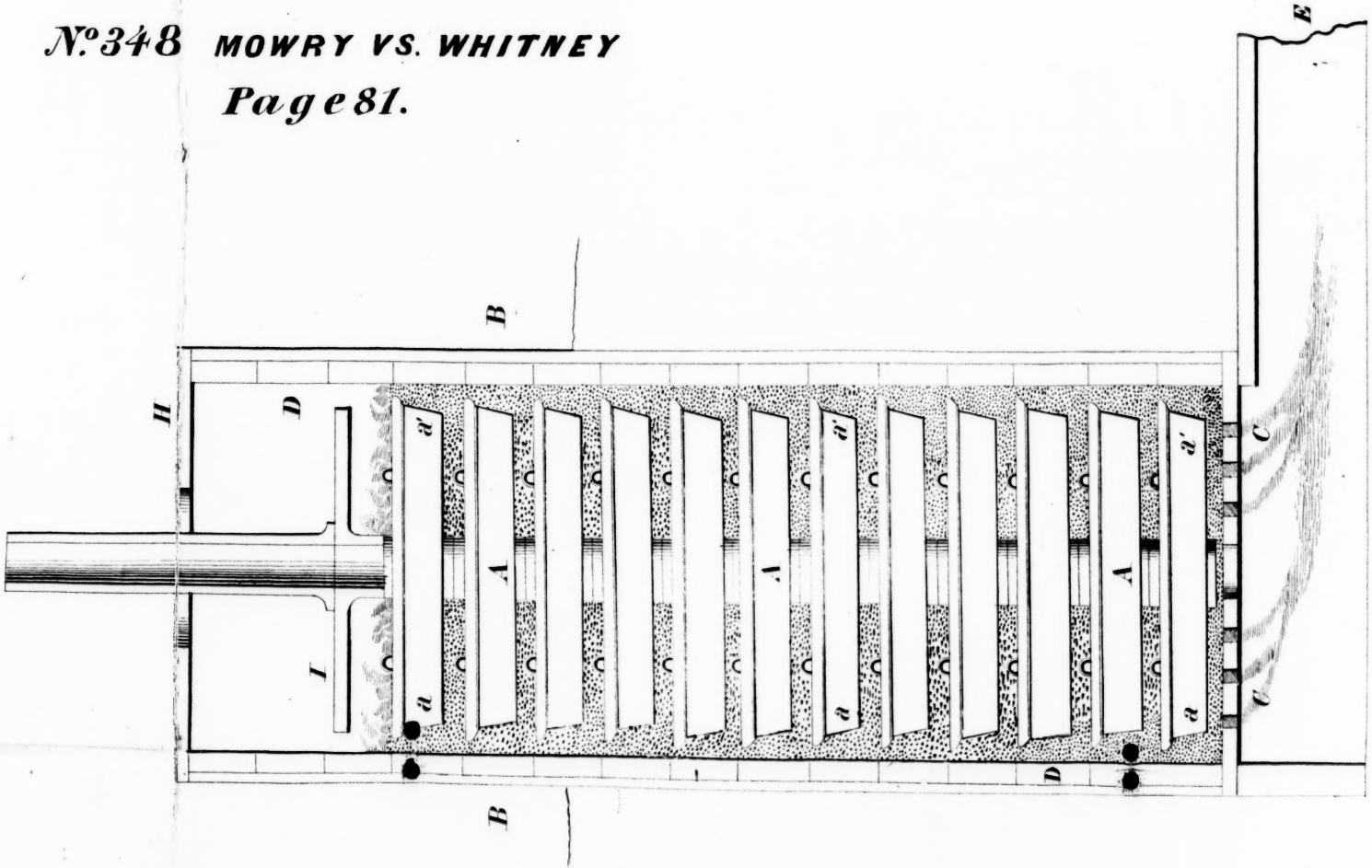
Horizontal section on the line AB.



Scale 1 feet to one inch.

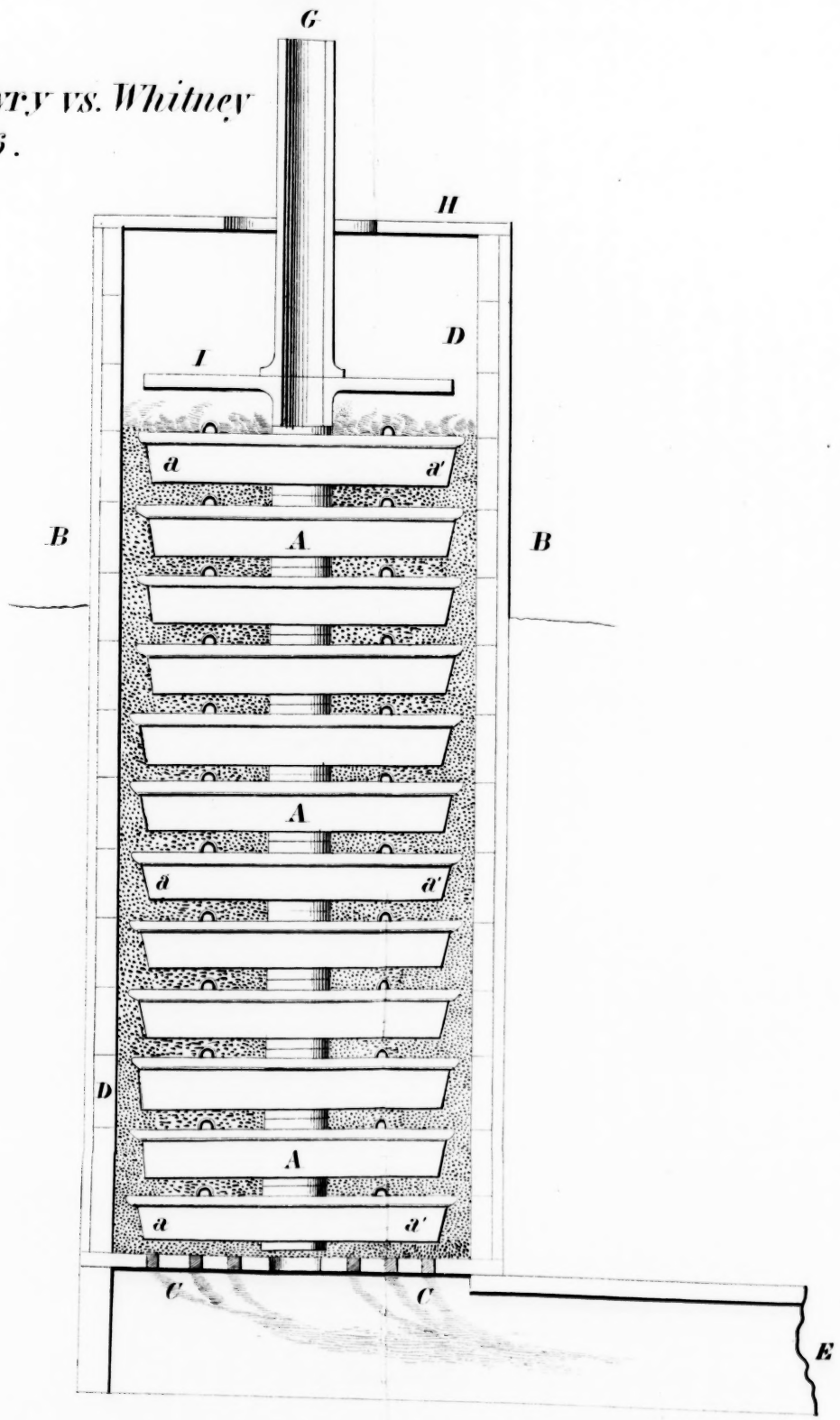
N°348 **MOWRY VS. WHITNEY**

Page 81.



EXIBIT. C.

N.° 349 Mowry vs. Whitney
Page 26.



№ 349 Mowry vs. Whitney

Page 35.

Fig. 1.

Vertical cross section of FURNACE

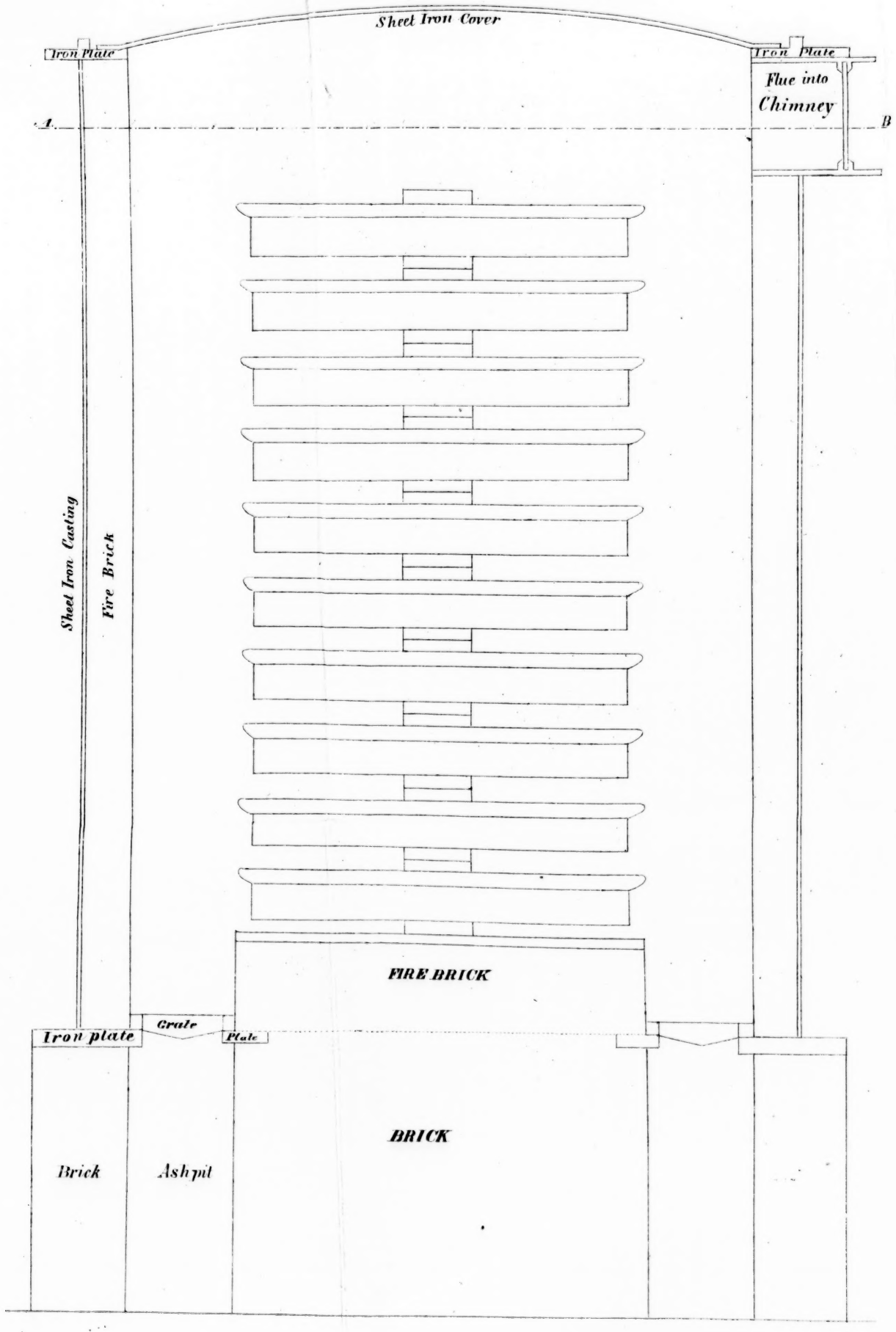
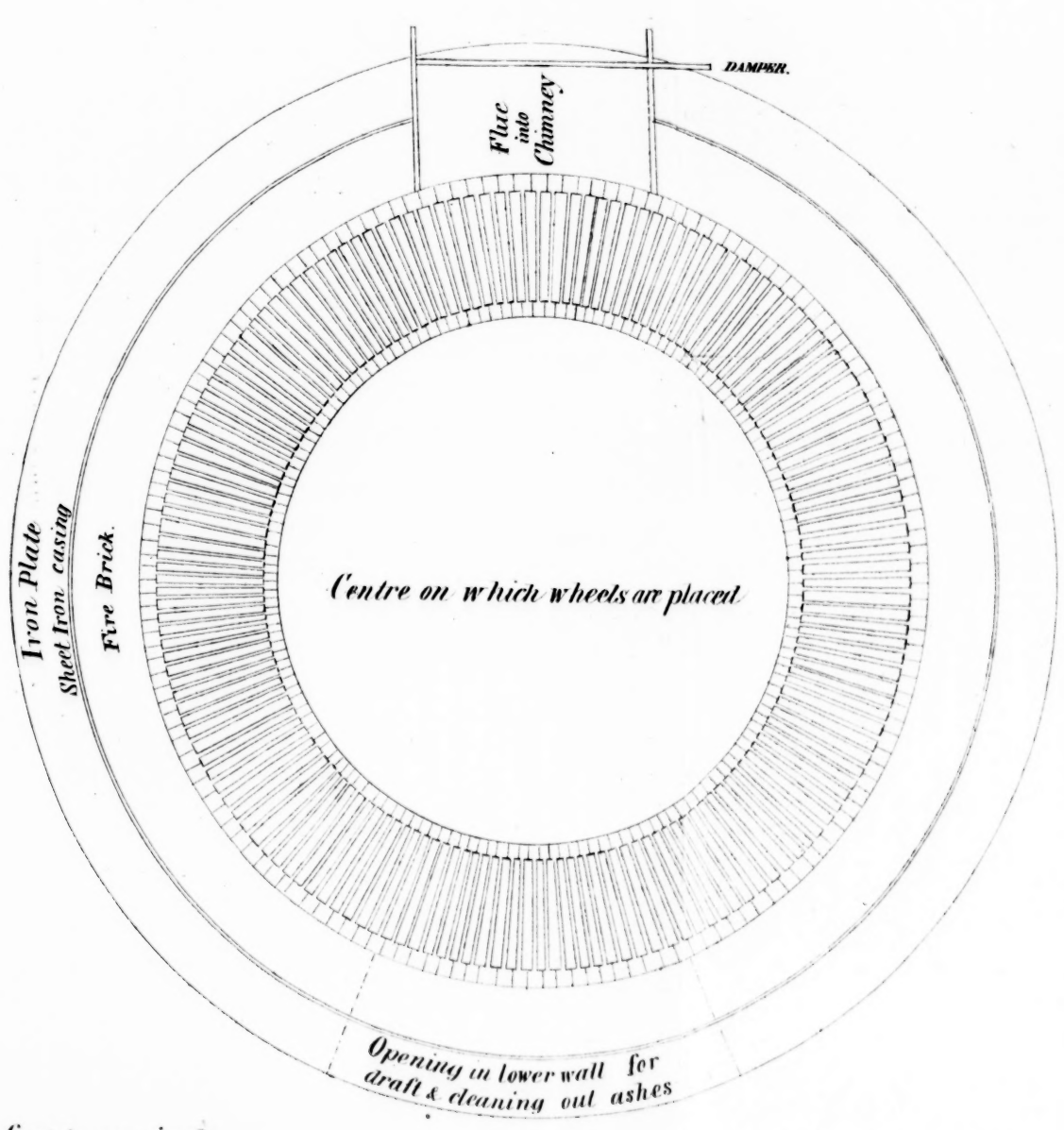


Fig. 2.

Horizontal section on the line AB.



Scale 4 feet to one inch.

No 349 . Mowry vs. Whitney
Page 70.

A. L. MOWRY'S

Improved Mode of Annealing Car Wheel

Patented May 7th 1866.

No 1248

Fig 1

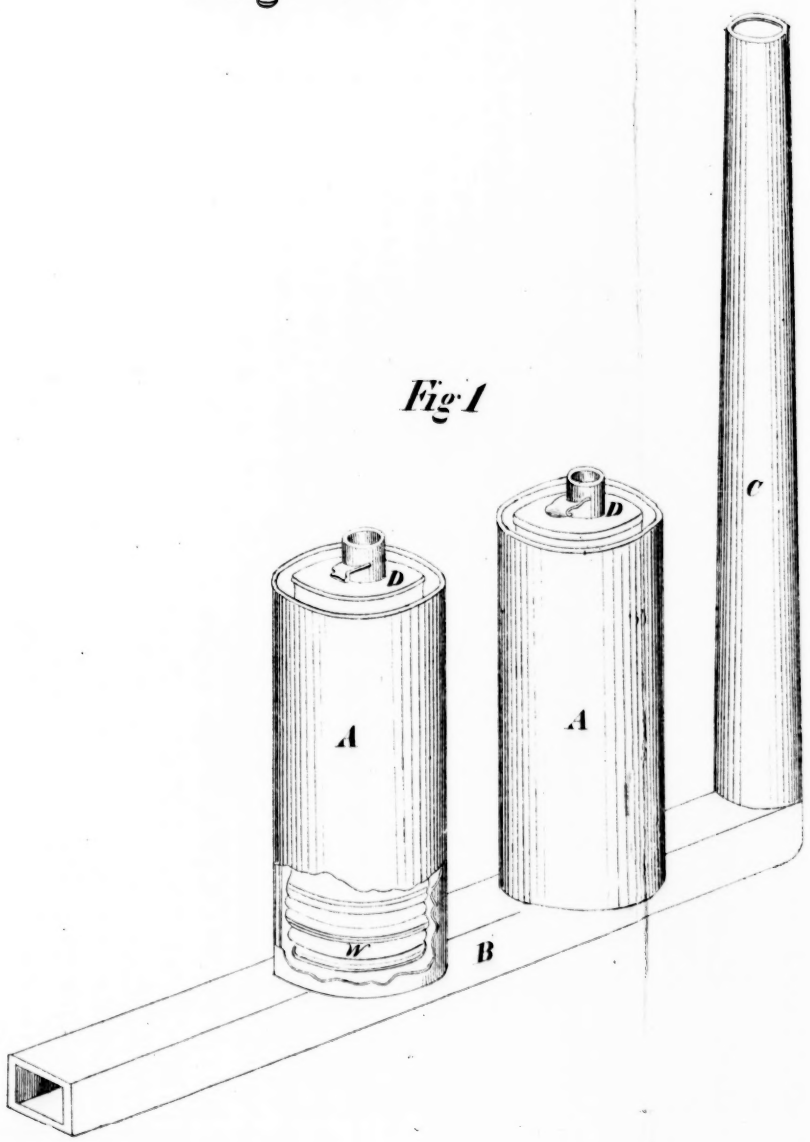
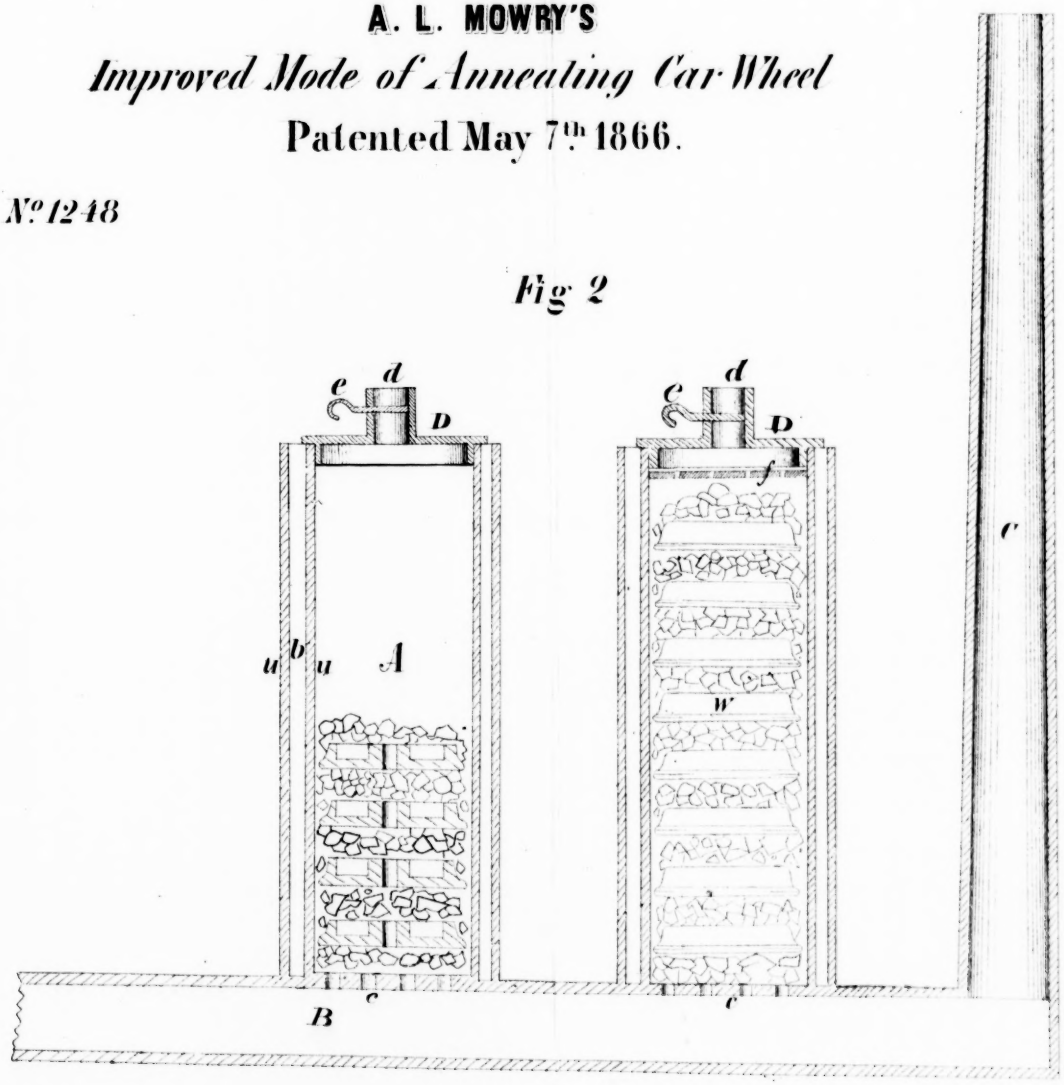


Fig 2



№359 Easley & al vs. Kellom & al
Page 101.

CAPITOL ADDITION

To the City of OMAHA.

Being the S½ of the N.E.¼ of Sec. 21 and the S.W. ¼ of the N.W. ¼ of Sec. 22. T. 15. N. R. 13 E. 6th P. M.

(Plat Recorded Nov.r. 12. 1860.)

N.

W E

S

815 Ft.

823 Ft.

Lot 5 C.H. Downs

15. 14 a.

314 Ft.

Nov. 13/60

Jno. McCornick

Lot 4

5 a.

694

706 Ft.

J. H. Kellom

Lot 3.

11 25 a.

694

486 Ft.

Nov. 13/60

R. Gaylord

Lot 2

7.74 a.

694

218 Ft.

C.C. Monell & Hitchcock.

Lot 1.

3.47 a

694

STREET

Sections 21 & 22 Range 13 East of 6th Prin. Mer.

314 706 Ft. 486 218

N. **FARNHAM STREET**

815 540 Ft.

497 Ft.

Houston Nuckolls

Lot 6.

16.06 a.

Nov. 19/60

Line between Township 15

214 165 806 Ft.

Jany 1861.

Conant

Lot 7

2.58 a.

Wm. Johnson

526

McCormick

Lot 8

2 a.

526

J. W. Damon. Nov 13/60

Lot 9 or C.E. Stone.

9.73. a.

526

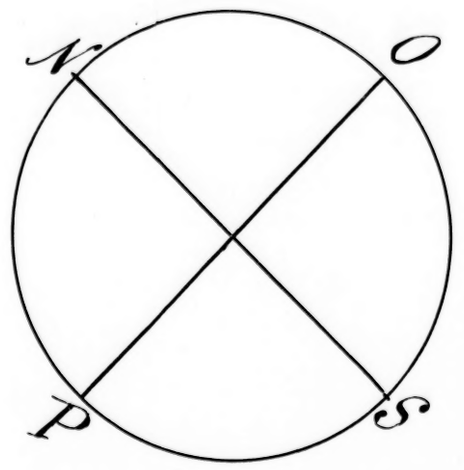
TWENTIETH

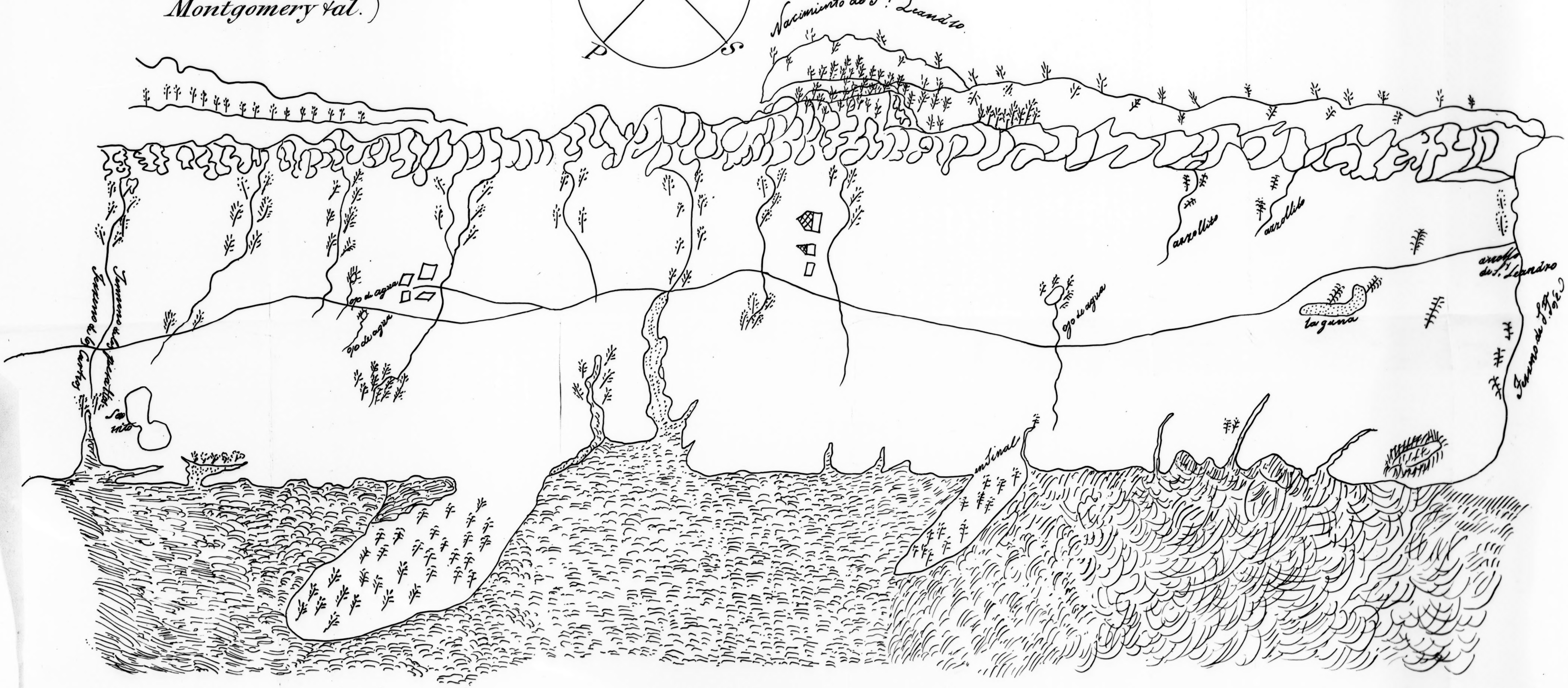
1375 214 165 806

Diteño or plat referred to in the foregoing Petition. (Exhibit No. 18.)

No. 361.- Carpenter
vs.
Montgomery et al. } *page 62.*

I hereby certify this to be a full true and correct copy of the original diteño as found in the Espediente instituted by Don Ignasio Penalta petitioning for the place named San Antonio, which Espediente is on file in the Spanish Archives, in the Office of the U. S. Sur. General. R. C. Hopkins. Keeper of Archives.





1793 = 1794

N° 362 SCHUYLKILL & D. Ir R. R.C°

vs. Munson & al

PAGE 36.

Northumberland

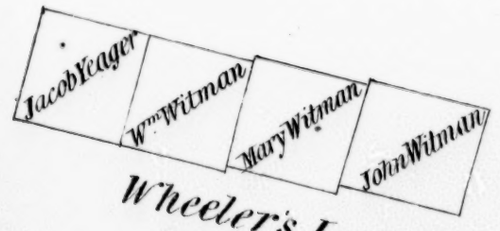
Erected March 21st 1772

Berks - County

Erected March 11th 1752

Dauphin County

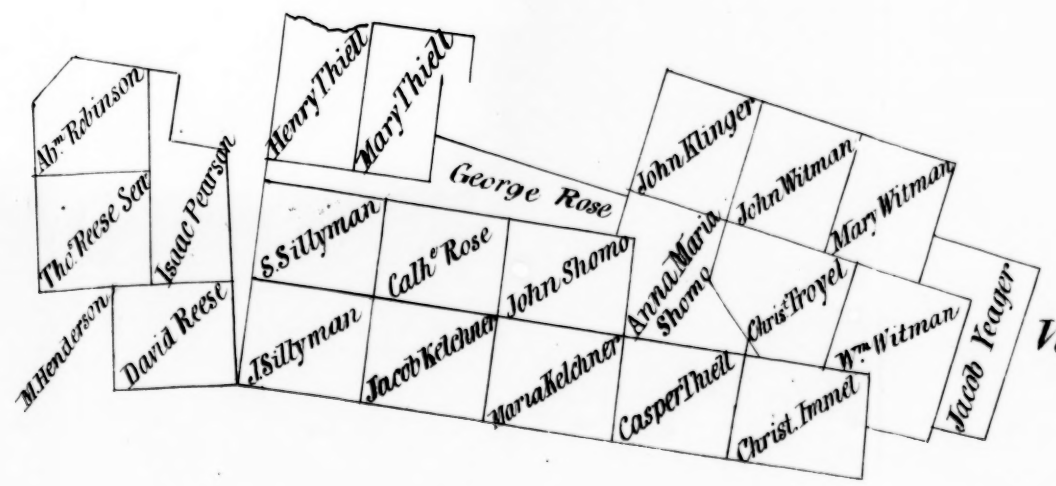
Erected March 4th 1785



Wheeler's Location

rthumberland

Erected March 21st 1772



County

Vanderslices location

Berks - County

Erected March 11th 1752.

Northampton County

Erected March 11th 1752.

Scale 400 Pr. to one inch